SUPREME COURT, U. S.

FILED

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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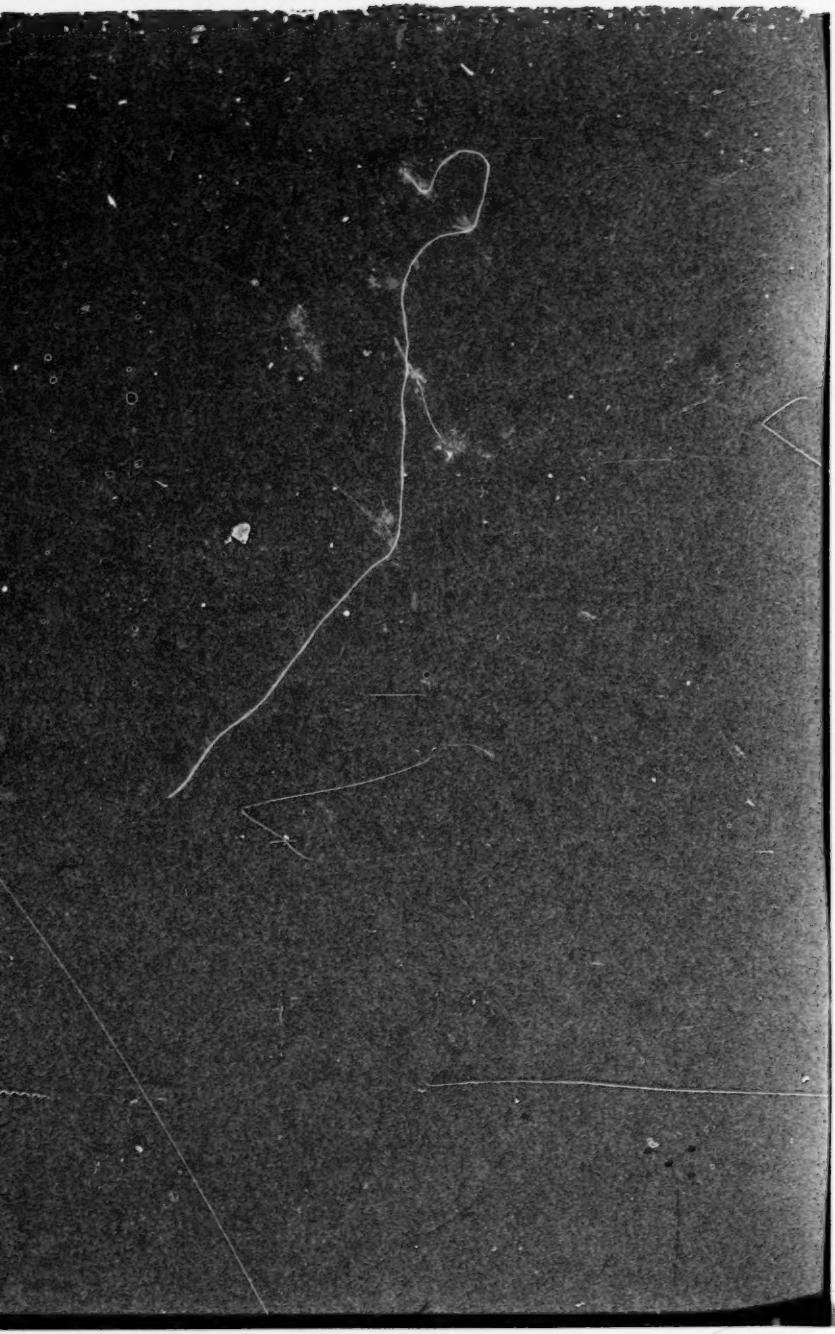

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. THE COURTS BELOW HAVE MISCONCEIVED THE EFFECT OF UPHOLDING THE EXCULPATORY CLAUSE UPON THE PUBLIC INTEREST AND IN SO DOING HAVE UNDERMINED THE FEDERAL REGULATION OF AIRCRAFT SAFETY 5

2. THE COURTS BELOW INCORRECTLY REFUSED TO FOLLOW THE LAW OF CALIFORNIA WHICH, CONSISTENT WITH THE GENERAL LAW, REQUIRES A HOLDING THAT THE EXCULPATORY CLAUSE IS AGAINST PUBLIC POLICY AND VOID 9

CONCLUSION 12

APPENDIX

Statutory Provisions

Federal Aviation Act of 1958, Section 601, 49 U.S.C. §1421 ..... A-1

TABLE OF CONTENTS (Cont'd)

Page

Federal Aviation Act of 1958, Section 603, 49 U.S.C. §1423 ..... A-2

Order and Opinion of the United States District Court dated October 30, 1972 ..... A-4

Order of United States District Court dated November 22, 1972 ..... A-12

Opinion of the United States Court of Appeals for the Fifth Circuit dated October 31, 1974 ..... A-14

Judgment of the United States Court of Appeals for the Fifth Circuit dated October 31, 1974 ..... A-25

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing dated December 17, 1974 ..... A-26

Letter of the Federal Aviation Administration dated April 24, 1969 ..... A-27

TABLE OF AUTHORITIES

CASES

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) 7,9
Buckner v. Azulai, 59 Cal. Rptr. 806 (1967) 11
Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965) 6,9,10,12
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 9

TABLE OF AUTHORITIES (Cont'd)

Page

Halliday v. Greene, 53 Cal. Rptr. 267 (1966) 11
Hanna v. Lederman, 36 Cal. Rptr. 150 (1963) 10
Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (9th Cir. 1965) 7,9
Tunkl v. Regents of Univ. of Calif., 32 Cal. Rptr. 33, 383 P.2d 441 (1963) 12

STATUTES

California Civil Code §1668 (West 1972) 3,6
Federal Aviation Act of 1958, Section 601, 49 U.S.C. §1421 2,6
Federal Aviation Act of 1958, Section 603, 49 U.S.C. §1423 2,6
Federal Aviation Regulations §21.165, 14 C.F.R. §21.165 2,3,6,11
28 U.S.C. §1254(1) 2
28 U.S.C. §1292(b) 5
28 U.S.C. §1332 4

OTHER AUTHORITIES

Restatement of Contracts 9

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No.

DELTA AIR LINES, INC.,

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McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Delta Air Lines, Inc. (Delta), respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment entered in this case on October 31, 1974, rehearing of which was denied on December 17, 1974. The case involves important questions as to the effect of the violation of Federal Aviation Regulations by manufacturers of large commercial aircraft and calls for the application of this court's supervisory power to correct a grossly incorrect decision by the Fifth Circuit. The decision of the Fifth Circuit constitutes a clear failure to follow the applicable law and will result in the

the manufacture of aircraft, contrary to principles recognized by this Court and another Court of Appeals. Unless corrected by this Court, the decision could lead to a decrease in the safety standards of large aircraft manufacturers and a lower regard for the safety regulations of the Federal Aviation Administration (FAA).

OPINIONS BELOW

The opinion of the Court of Appeals, 503 F.2d 239 (5th Cir. 1974), is set out in the Appendix, as is the opinion of the United States District Court for the Northern District of Georgia, 350 F.Supp. 738 (USDC ND Ga. 1972).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1974, and a timely petition for rehearing was denied on December 17, 1974. This petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an exculpatory clause which relieves a federally regulated manufacturer of aircraft from the consequences of violating a federal regulation requiring the safe manufacture of aircraft is void as being contrary to public policy.

STATUTORY PROVISIONS INVOLVED

1. Sections 601 and 603 of the Federal Aviation Act of 1958, 49 U.S.C. §§1421, 1423 are set out in the Appendix.

2. Section 21.165 of the Federal Aviation Regulations, 14 CFR §21.165, provides as follows:

> "21.165. *Responsibility of holder.*
>
> The holder of a production certificate shall
>
> (a) Maintain the quality control system with the data and procedures approved for the production certificate; and,
>
> (b) Determine that each aircraft submitted for airworthiness certification or approval conforms to the type design and is in a condition for safe operation."

provides as follows:

> "§1668. *Contracts contrary to policy of law*
> CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

STATEMENT OF THE CASE

This case arises out of the collapse of the nose gear of a new "stretched" DC-8 aircraft in January of 1969, some two weeks after it had been delivered by McDonnell Douglas Corporation (MDC) to Delta pursuant to a purchase agreement between the parties. (At the time the stretched DC-8 was the largest passenger-carrying aircraft in the world.) The collapse occurred when a regularly scheduled passenger flight was landing in Jacksonville, Florida. Fortunately, there were no injuries to passengers or the crew, but the nose and nose gear portions of the aircraft were substantially damaged.

After investigation Delta advised MDC that the collapse had resulted from the negligence of MDC and later requested MDC to reimburse it for damages sustained by Delta in the amount of approximately $203,000. The FAA also concluded that MDC had been at fault and that MDC had violated Section 21.165(b) of the Federal Aviation Regulations by failing to determine that the aircraft was in a condition for safe operation. (A copy of the FAA's letter in this regard is included in the appendix.)

MDC nevertheless refused to honor Delta's request for reimbursement and contended that it had no liability under the exculpatory clause of the purchase agreement. That clause provides that MDC's liability is limited to its express warranty obligations and that MDC is not responsible for any other

liabilities, even if occasioned from its own negligence.[1] MDC further denied that it had any obligation under the express warranty.

Subsequently, Delta initiated this action against MDC in the United States District Court for the Northern District of Georgia. Jurisdiction was based upon diversity of citizenship and amount in controversy under 28 U.S.C. §1332. MDC filed a motion for summary judgment based upon the exculpatory clause and the motion was overruled. The parties then agreed to a limited non-jury trial upon the issue of the effect of the exculpatory clause upon the various theories of recovery set out in Delta's complaint.

Following this trial the District Court entered a judgment dismissing Delta's claim insofar as it was based upon negligence and strict liability in tort on the basis that the exculpatory clause was broad enough to cover both of these theories and that the exculpatory clause did not violate public policy, despite the fact that it relieved MDC of the consequences of violating a federal aviation regulation; despite the California statute which specifically declares that any contract relieving a person from responsibility for a willful or *negligent* violation of

---

[1] The entire clause reads as follows: "(G) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer, provided that in the event the provision relieving Seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect."

law is against public policy;[1] despite a clearly correct decision by the Ninth Circuit Court of Appeals reaching a contrary result, and despite a clearly correct decision by the Ninth Circuit Court of Appeals reaching a contrary result, and despite a decision of this Court recognizing that one of the main purposes of the rule preventing enforcement of release-from-negligence contracts is to discourage negligence by making the wrong-doer pay damagers. The District Court concluded, however, that there was substantial ground for difference of opinion and authorized an immediate appeal. Delta prosecuted an interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The Courts Below Have Misconceived the Effect of Upholding the Exculpatory Clause Upon the Public Interest and in So Doing Have Undermined the Federal Regulation of Aircraft Safety.

MDC has contended, and the courts below have agreed, that the only thing involved in this case is whether two large corporations may agree to allocate the economic risks associated with defects in manufacturing even though the defects result from the manufacturer's negligence and even though the manufacturer violates federal safety regulations by its negligence. It also has been maintained by MDC that Delta could have paid more for the aircraft and secured the removal of the exculpatory clause. Although Delta's witnesses testified that it was *not* possible to negotiate the clause out of the contract, this is not the point raised by Delta's contention that the clause violates public policy and is void. *The point is that federal safety regulations are undermined by a private contract and that this is contrary to the public interest in attaining the highest possible degree of safety in the manufacture of aircraft which transport millions of passengers each year.*

---

[1] The parties had agreed that California law was applicable in determining the validity of the exculpatory clause.

In Section 601 of the Federal Aviation Act of 1958, 49 U.S.C. §1421, Congress has authorized the FAA Administrator to prescribe rules and regulations with respect to aircraft safety and in Section 603, 49 U.S.C. §1423, the Administrator is empowered to issue type and production certificates to manufacturers of aircraft under certain conditions and to issue airworthiness certificates for aircraft. (See Appendix.) Pursuant to this statutory authority the Administrator promulgated Section 21.165 of the Federal Aviation Regulations, 14 CFR §21.165, which requires the holder of a production certificate (such as MDC held for the "stretched" DC-8) to:

> "Determine that each aircraft submitted for airworthiness certification or approval conforms to the type design and *is in a condition for safe operation*." (emphasis added)

In its letter of April 24, 1969, the FAA stated that its investigation indicated that MDC had failed properly to assemble the aircraft and that MDC had violated §21.165(b) by failing to determine that the aircraft was in a condition for safe operation. (See Appendix.) Notwithstanding the fact that §1668 of the California Civil Code specifically declares as against public policy any contract which relieves a party of responsibility for a violation of law, the District Court and the Fifth Circuit refused to invalidate the exculpatory clause, which relieves MDC of responsibility for its own negligence even when it results in a violation of law.

The courts below failed to deal squarely with the issue raised by the California statute and the violation of the regulation, but instead relied upon the reasoning of a California court in an earlier case between Delta and MDC's predecessor, Douglas Aircraft Company, Inc., in which the issue had not been decided. In that case the court had said, "The upholding of the exculpatory clause will not adversely affect rights of future passengers" because "[t]hey are not parties to the contract and their rights would not be compromised." *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 238 Cal. App. 2d 95, 47 Cal. Reptr. 518 (1965). It is true that the rights of injured passengers would not be *directly* compromised, but

undoubtedly the passengers would prefer not to be injured in the first place. It is in order to *discourage* conduct which might cause such injuries that the courts have refused to uphold exculpatory clauses which affect the public interests and there could hardly be a matter in which the public has a greater interest than the safety of large commercial aircraft. The courts below lost sight of this point in concluding that the only issue was whether an allocation of risks should be upheld.

The principles involved were well-stated by the Ninth Circuit Court of Appeals in *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965), in which that court also demonstrated the views of this Court, expressed in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), as to the policy reasons for refusing to uphold exculpatory clauses such as the one involved here. Because of the pertinence of that case, which involved the public interest in safe aircraft operations, and the authority cited therein, it is quoted at length as follows:

> "It is, or course, ordinarily desirable that competent parties be protected in their rights to make and enforce agreements between themselves. *These rights are restricted by the transcendent rule that denies enforceability to a private contractual provision which would require an unlawful act or which, given effect, would gravely violate paramount requirements of public interest.* Especially significant here is the decision of our own court in Air Transport Associates v. United States, 221 F.2d 567 (9th Cir. 1955). There, the Government, the owner and operator of an Alaskan airport, had granted to an air carrier the right to employ the airport's facilities in exchange for valuable consideration and the execution by the carrier of an agreement undertaking to exculpate the Government for any loss arising from the carrier's operations. Following a nighttime crash of one of the carrier's planes, alleged to have resulted from the Government's negligence in parking a ground vehicle upon an unlighted runway, the carrier sued, under the Federal Tort Claims Act, to recover for the damage to its aircraft. *In defense, the Government invoked the exculpatory provision of the contract. We rejected the defense, holding that under the law of both Washington, where the contract was executed, and Alaska, where the contract was to be performed, the exculpa-*

tory provision was invalid. We held that its enforcement would be opposed to the policy interests of the general public. That decision rests upon the controlling fact that the airport was a public service. In looking to Washington law, we cited Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18, 175 A.L.R. 1 (1947), and Broderson v. Rainier Nat. Park Co., 187 Wash. 399, 60 P.2d 234 (1936), and we wrote, 221 F.2d at page 472,

> 'In both of those cases, while the Washington Supreme Court held valid exculpatory agreements, they recognized the general law concerning this type of agreement, and cited with approval the statement of that law found in the American Law Institute, Restatement of Contracts, Volume 2, Section 575(1) as follows:
>
> > ' "A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, *and a bargain for exemption from liability for the consequences of negligence is illegal if * * * (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.*' " [emphasis added]
>
> "In Bisso [Bisso v. Inland Waterways Corp.], 349 U.S. at 91, 75 S.Ct. at 632, we see the Supreme Court's views in the language, '*The two main reasons for the creation and application of the rule [to prevent enforcement of release-from-negligence contracts] have been (1) to discourage negligence by making wrong-doers pay damages, * * **. The dangers of modern machines make it all the more necessary that negligence be discouraged.' Can it be sincerely believed that the public interest is better served by the discouraging of the negligence of tugboat operators than by the discouraging of negligence on the part of operators of public airports? We think not." [emphasis added]

Similarly, can it be believed that the public interest in discouraging the negligent manufacture of aircraft is less important than discouraging the negligence of airport op-

erators? Obviously, it is not and there is an overriding public interest that aircraft be manufactured safely as is evidenced by the detailed federal regulation of aircraft manufacturers. Clearly, public policy will not allow a manufacturer to insist upon a contract exculpating it from the consequences of violating such regulations. That this is true as a matter of federal law is demonstrated by the *Bisso* case. That it is true as a matter of general law is demonstrated by the Restatement of Contracts quoted in the *Northwest* case. There is no divergence from the federal or general law in California, as will be shown hereinafter. But the Courts below have failed to recognize the principles involved and this failure is quite important to the nation as whole because so many aircraft manufacturers are located in California and because of the effect of the decision upon the federal scheme of regulating aircraft safety.

2. The Courts Below Incorrectly Refused To Follow the Law of California Which, Consistent With the General Law, Requires a Holding that the Exculpatory Clause Is Against Public Policy and Void.

Both the District Court and the Court of Appeals incorrectly relied upon *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., supra*, in holding that the exculpatory clause did not violate public policy, despite the fact that the question of violation of a federal regulation had not been decided by the *Delta v. Douglas* court. The Court of Appeals acknowledged that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it was obliged to follow the law of California and that in *Delta v. Douglas* the court had not decided the question of whether the exculpatory clause would have been invalid if a federal regulation (or any other law) had been violated. Nevertheless, the court failed to take the next step required of it under the *Erie* doctrine of looking to other California cases which *had* ruled on the point. Instead of moving on to the applicable California cases the Court used the "bootstrap" reasoning that it had already concluded that the exculpatory clause was not invalid:

> "The total comments in the [Delta v. Douglas] opinion relating to this argument about Section 1668 leave no inference whatsoever as to how the court would have handled the argument had Douglas violated the regulations. See 47 Cal. Rptr. at 525. With the *Douglas* case providing no guidance, we feel our analysis of Delta's first point applies equally to this point, and Delta's argument fails."

Delta demonstrated, however, in its petition for rehearing, that the Court's analysis of the "first point" was incorrect and was not based upon California law, but upon an irrelevant principle of North Dakota law.[1] Moreover, nothing the court said could change the fact that the question of the effect of a violation of law was not ruled upon in *Delta v. Douglas* so that the court's clear duty was to apply the California cases which *had* decided the point. The California cases which *do* apply are discussed below.

In the case of *Hanna v. Lederman*, 36 Cal. Rptr. 150 (1963), the court had before it the exact legal issue presented in this case. There plaintiffs were tenants who were suing their landlord for damages resulting from a defective fire sprinkler system, which defect was alleged to be in violation of a city ordinance. The landlord maintained that the action was barred by an exculpatory provision in the lease which provided that "Lessee . . . hereby waives all claims against lessor for damages . . . from any cause arising at any time. . . ." (This is exactly the same as McDonnell Douglas' contention that Delta's claim is barred by the exculpatory clause.) After determining that the city ordinance was applicable, the Court held:

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[1] The court found, in regard to the so-called "first point," that Delta had confused "a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence [citation omitted] with the liability that may be imposed by law." Delta pointed out in its petition for rehearing that the court had apparently misunderstood Delta's argument because the issue was not whether Delta could *prove negligence* by showing a violation of law (the negligence *per se* doctrine), but *whether the exculpatory clause was valid* if it relieved MDC of the consequences of violating a law.

> "Each lease contained an exculpatory provision which has been set forth hereinabove. The effect of that provision must be determined in light of section 1668 of the Civil Code.
>
> * * *
>
> "Since the claim for damages because of negligence embodied in the first cause of action . . . was predicated upon an alleged violation of [the city ordinance], *the exculpatory provision could not be a defense* to that cause of action if the evidence showed such violation to be a proximate cause of the tenant's loss." (36 Cal. Rptr. 25 154) [emphasis added]

Similarly, in this case Delta's negligence count alleges that MDC violated 14 C.F.R. §21.165 and that this violation was a proximate cause of Delta's damages. The cases are conceptually identical.

In a later case which is very similar to the *Hanna*, the California Fifth District Court of Appeals held in *Halliday v. Greene*, 53 Cal. Rptr. 267 (1966), that sublessees were covered by a safety order issued pursuant to law, and that an exculpatory clause in the lease was ineffective, saying:

> "However, the defect here constituted a violation of a safety order. If the safety order is applicable, the exculpatory clause is ineffective because Civil Code Section 1668 provides: [quotation omitted]
>
> "Public policy as expressed in Section 1668, prohibits an agreement to relieve one of the consequences of his violation of the law, and this is whether the violation be willful or negligent." (*Stonehocher v. Casano*, 154 Cal. App. 2d 732, 736, 316 P.2f 717.) (53 Cal. Rptr. at 272)

The principle was again reaffirmed in the case of *Buckner v. Azulai*, 59 Cal. Rptr. 806 (1967), where the court said "Any attempted waiver of such a duty so imposed by law is invalid." (59 Cal. Rptr. at 808)

By ignoring the cases cited above, which are the *only* cases cited to the Court on the validity of an exculpatory clause which relieves a party from the *civil* liability resulting from a violation of law, the Court violated its own conclusion as to the requirement of the *Erie* doctrine:

> "What may be more important in addressing the plaintiff's contention is that under Erie R.R. v. Tompkins, *supra*, we are bound to follow state law, whether or not we agree with the reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. Delta has not cited us to any subsequent California decisions criticizing, distinguishing, or modifying the *Douglas* case. Therefore, *Douglas* remains the latest, most authoritative expression of California law applicable to the facts of this case. It is controlling for our purpose. See Ford Motor Co. v. Mathis, 322 F.2d 267, 269 (5th Cir. 1963)."

Delta did not need to cite any such cases, however, because even the Court of Appeals found that *Delta v. Douglas* did not deal with the question at issue. *Delta v. Douglas* was irrelevant on this point and it was not necessary that it be distinguished. Delta cited the California cases applicable to this question and neither the Court of Appeals nor MDC has or could distinguish them. Moreover, the cases cited by Delta were perfectly consistent with the leading California case of *Tunkl v. Regents of Univ. of Calif.*, 32 Cal. Rptr. 33, 391 P.2d 168 (1963). In *Tunkl* it had been held that exculpatory clauses affecting the public interest cannot be upheld and the court discussed a number of factors to be considered in determining if the public interest is involved,[1] but there was no violation of law involved in that case as there is here. Clearly, a violation of law or regulation (dealing with aircraft safety in this case) conclusively establishes a public interest, specifically recognized in §1668 of the California Civil Code, stronger than any of the individual factors mentioned in *Tunkl* for determining the public interest when a law or regulation is *not* violated.

CONCLUSION

In the Federal Aviation Act Congress established a pervasive scheme for regulating all aspects of safety in air transportation, including the manufacture of aircraft. In pur-

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[1] Delta pointed out in its briefs below that the *Delta v. Douglas* court had improperly distinguished *Tunkl* by concluding that public interest factors were not involved in the manufacture of aircraft.

suance of that scheme the FAA, *inter alia*, has issued regulations, which have the force of law, designed to insure the highest degree of safety possible in the manufacture of aircraft. That safety in the manufacture of aircraft is a matter of overriding federal public interest cannot be doubted. If an aircraft manufacturer may by contract relieve itself of any of the consequences which normally flow from the violation of these regulations then the federal regulatory scheme is seriously undermined. As this Court said in the *Bisso* case, *supra*, one of the two main reasons for the creation and application of the rule preventing the enforcement of release-from-negligence contracts is "to discourage negligence by making the wrongdoer pay damages * * *."

Consistent with the general law, California has declared that contracts which relieve a party of responsibility for a negligent or willful violation of law are void and its courts consistently have stricken down such clauses when raised as a defense in an action for damages.

If the decision of the Court of Appeals below is not reversed so as to comport with federal policy and California law, the public interest in the safe manufacture of aircraft will be thwarted, the federal law will be undermined and a serious error of decision will be allowed to stand. For these reasons, Delta respectfully prays that a writ of certiorari be issued to the Court of Appeals to review its decision in this case.

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STATUTORY PROVISIONS

Federal Aviation Act of 1958, Section 601, 49 U.S.C. §1421

§1421. Powers and duties of Administrator–Minimum standards; rules and regulations

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and

procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Consideration of needs of service; classification of standards, rules, regulations, and certificates

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

Exemptions

(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest. Pub.L. 85-726, Title VI, §601, Aug. 23, 1958, 72 Stat. 775.

Federal Aviation Act of 1958, Section 603, 49 U.S.C. §1423

§1423. Aircraft certificates–Authorization to issue; application; investigation; tests; issuance of type certificate

(a) (1) The Administrator is empowered to issue type

certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2) Any interested person may file with the Administrator an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Administrator shall make an investigation thereof and may hold hearings thereon. The Administrator shall make, or require the applicant to make, such tests during manufacture and upon completion as the Administrator deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenance of such aircraft, aircraft engine, propeller, or appliance. If the Administrator finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator, he shall issue a type certificate therefor. The Administrator may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Administrator may record upon any certificate issued for aircraft, aircraft engines, or propellers, a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

Production certificates

(b) Upon application, and if it satisfactorily appears to the Administrator that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Administrator shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft engines, propellers, or appliances. The Administrator shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate as may be necessary to assure manufacture of each unit in

conformity with the type certificate or any amendment or modification thereof. The Administrator may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety.

Airworthiness certificates

(c) The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety. Each such certificate shall be registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator. Pub.L. 85-726, Title VI, §603, Aug. 23, 1958, 72 Stat. 776.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Delta Air Lines, Inc.,	)	
Plaintiff	)	
v.	)	**Civil Action No. 13768**
McDonnell Douglas Corporation,	)	
Defendant	)	

ORDER

Findings of Fact

1. This case involves the collapse of the nose landing gear assembly of a "stretched" or "super" DC-8 aircraft manufac-

tured by defendant McDonnell Douglas Corporation ("MDC") and operated by plaintiff Delta Air Lines, Inc. ("Delta"). Federal court jurisdiction is founded upon diversity of citizenship and an amount in controversy in excess of $10,000, exclusive of interest and costs. 28 U.S.C. § 1332.

2. At the July 10, 1972, nonjury trial the parties advised the Court that the evidence and discovery developed to date indicates that the cause of the nose gear collapse during the landing roll of the aircraft was an incorrectly installed component part of the nose landing gear assembly. Delta contends that the component part was installed incorrectly by MDC when MDC assembled the aircraft. MDC on the other hand contends that the component part was correctly installed during assembly and that the component part was removed and re-installed incorrectly during post-delivery servicing of the aircraft by Delta. In the alternative, MDC contends that if there was a "defect in workmanship" (*i.e.*, incorrect installation of a component part), Delta should and could have in the exercise of ordinary care detected such defect in workmanship, and that the alleged damages therefore arise from Delta's own negligence.

3. Delta's amended complaint seeks to impose liability on four theories: Count One alleges negligence; Count Two alleges breach of implied warranties of merchantability and fitness for a particular purpose; Count Three alleges breach of the express warranty; and Count Four alleges strict liability in tort.

4. As an additional and affirmative defense MDC asserts:

(a) the limitations of liability and exculpatory clause contained in the Warranty Article of the Purchase Agreement negotiated and agreed to by the parties bar Delta's claims based on negligence, breach of implied warranties and strict liability;

(b) MDC is not liable for breach of express warranty because the Warranty Article specifically provides that liability for breach of the express "workmanship" warranty is limited, among other things, to the replacement of the improperly installed part;

(c) Delta failed to follow the warranty claim procedures spelled out in the Warranty Article, which relieved MDC of liability with respect to the claim based on breach of express

warranty; and

(d) in any event MDC is not liable for the type of damages sought by Delta because such damages are specifically excluded by the limitations of liability and exculpatory clause contained in the Purchase Agreement Warranty Article.

5. MDC filed a motion for summary judgment (supported by evidence) based on the defenses outlined in the preceding paragraph. Delta submitted opposing affidavits and contended, among other things:

(a) as a matter of economic necessity Delta was required to purchase MDC's "stretched" DC-8 aircraft;

(b) the limitations of liability and exculpatory clause in the Purchase Agreement Warranty Article were forced upon Delta by MDC;

(c) Delta did not voluntarily agree to such provisions;

(d) Delta was unable to negotiate a deletion of such provisions from the Purchase Agreement;

(e) the Purchase Agreement is a contract of adhesion in this respect;

(f) the limitations of liability and exculpatory clause are unconscionable, violate public policy and are unenforceable; and

(g) the provisions of the Warranty Article therefore do not bar Delta's claims for relief.

6. The Court denied MDC's motion for summary judgment because there appeared to be material issues of fact in dispute. At the request of the parties, based upon a limited waiver of jury trial, the Court held a nonjury trial on July 10, 1972, to decide the validity of the "defense based upon the Warranty Article and exculpatory clause contained in the contract documents" (Limited Waiver of Jury Trial, filed June 15, 1972).

7. The Purchase Agreement in question was signed at Long Beach, California, on November 18, 1964, and originally related only to the so-called "short" DC-8 aircraft, or Series 51 DC-8 aircraft. On August 13, 1966, at Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement. The amendment provided that additional DC-8

aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964, Purchase Agreement. The accident aircraft was one of the aircraft covered in Amendment No. 5.

8. Article 4 of the Purchase Agreement stated the aircraft would be manufactured and delivered in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." The Purchase Agreement also contained clauses which limited the agreements between the parties to the exact written terms of the contract.

9. At the time of the accident in question, Delta was operating the aircraft under a lease agreement with McDonnell Douglas Finance Corporation, but the lease was contemplated by the parties and they agreed that the lease agreement would not abrogate or modify the provision of the Purchase Agreement.

10. The Warranty Article in the Purchase Agreement provided:

"12. WARRANTY.

"(A) Subject to the limitations and conditions hereinafter set forth, seller warrants that the aircraft, accessories, equipment and parts supplied hereunder which have been manufactured by seller, and by other manufacturers if made to detailed design and detailed specifications originated by seller, shall at the time of delivery by seller be free from:

(1) Defects in material and workmanship furnished by seller and used in the fabrication thereof;

(2) Defects arising from the selection of material or process of manufacture;

(3) Defects inherent in the design thereof in view of the state of the art as of the date of such design;

(4) Defects arising from failure to conform to the detailed specifications of this purchase agreement except as to such portions thereof, if any, as are expressly stated to be not guaranteed.

"(B) Defects in material and workmanship, defects arising from the selection of material or process of manufac-

ture and defects arising from failure to conform to the detailed specifications, must become apparent in the aircraft, accessory, equipment or part within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

"The extent of seller's liability under this warranty as to defects in material or workmanship, defects arising from the selection of material or the process of manufacture, and defects arising from failure to conform to the detailed specifications, is limited to the repair at its expense of such defects in the aircraft or to the repair or replacement at its expense (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

"(C) The extent of seller's liablity under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment or part purchased hereunder within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

"(D) Seller shall make the foregoing repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft, system, accessory, equipment or part involved may not be kept out of service longer than necessary. Disassembly of the aircraft to correct the defect, removal of the defective or faulty structure, system, accessory, equipment, or new part and installation of the corrected or new structure, system, accessory, equipment or new part and re-assembly of the aircraft shall be at buyer's expense, unless such work is performed by seller at its factory at Long Beach, California, or unless buyer offers to return the aircraft, accessory, equipment or part and buyer and seller thereafter mutually agree that buyer will perform the work and that seller will pay buyer in whole or in part for removal, installation and re-assembly of the aircraft. Cost of temporary or interim repairs, replacements and corrections accomplished by buyer, as well as any consequential cost related thereto, shall likewise be at buyer's expense, except when seller, in advance, approves in writing such temporary or interim repairs, replacements and corrections and the cost thereof, which cost seller may agree to pay in whole or in part.

"(E) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

(1) The aircraft is operated with any accessory, equipment or part not specifically approved by seller and not manufactured by seller or to seller's design and specification unless buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

(2) The aircraft shall not have been operated or maintained in accordance with seller's instructions furnished under this agreement, unless buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

(3) The aircraft shall not have been operated under normal airline use, unless buyer furnishes reasonable evidence that such operation was not a cause of the defect;

(4) The aircraft shall not have been repaired, altered or modified without seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accident shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made within suitable material and according to standard practice and engineering;

(5) Buyer does not (i) report the defect in writing or by telegram to seller's warranty administrator at its factory in Long Beach, California, within sixty (60) days following such defect becoming apparent to buyer as provided in paragraphs (B) and (C) above, and (ii) return the defective or faulty aircraft, accessory, equipment or part to said factory (or, if return to seller's factory is not feasible and seller so agrees in advance in writing, which agreement shall not unreasonably be withheld, to buyer's base repair shop or other appropri-

ate facility in the United States) within sixty (60) days following the end of the applicable period of time specified in paragraphs (B) and (C) above, or within sixty (60) days following such defect becoming apparent, whichever is earlier, and further provided that if, for reasons beyond buyer's control, return of the items to seller's factory is not possible within said sixty (60) day period, and if buyer so notifies seller in writing and seller so agrees in writing, which agreement shall not unreasonably be withheld, the said sixty (60) day period will be waived, but buyer must return the item to seller's said factory if, as and when said return does become feasible. Buyer also must submit reasonable proof to seller, within sixty (60) days after the defect becomes apparent (except when such period is waived) that the defect is due to a matter embraced within the seller's warranty hereunder. Seller shall approve or disapprove buyer's substantiated warranty claim in writing within sixty (60) days of receipt thereof. All such transportation, including return to buyer of the repaired, replaced or corrected aircraft, accessory, equipment or part shall be at buyer's expense.

"With respect to matters made the subject of seller's approval under sub-paragraphs (1), (4) and seller's approval or disapproval of buyer's warranty claim under (5) of this paragraph (E), seller's approval or disapproval thereof shall be made in writing to buyer within sixty (60) days after buyer's written notice requesting approval is received by seller. In the event of disapproval, seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to buyer a written statement of approval or disapproval within such sixty (60) day period shall irrevocably and conclusively constitute approval by seller of the subject matter of the particular request involved.

"(F) Normal wear and tear and the need for regular overhauls shall not constitute a defect or failure under this warranty. Buyer acknowledges that some of the accessories, equipment and parts warranted hereunder have a normal life expectancy that is less than the time period specified under paragraph (B) and (C) above.

"(G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and

buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect."

11. The aircraft Purchase Agreement incorporated the terms of a prior agreement, including the Warranty Clause, which were the subject of intensive negotiation. There was no substantial imbalance in the bargaining position of the parties and the Warranty Clause was not dictated by MDC on a "take it – or leave it" basis. Due to the California Court of Appeals decision in *Delta Air Lines, Inc. v. Douglas*, 230 Cal. App.2d 95 (Nov. 9, 1965), entered several months before the parties entered into the agreement in the instant case, Delta was aware that MDC would, under certain circumstances, agree to modification or elimination of the exculpatory clause, albeit for a price which Delta apparently did not wish to pay (see, 230 Cal. App.2d at 103, n.5).

Conclusions of Law

When ruling on substantive matters of law, federal courts must follow the laws of the State in which it sits [*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)] including its Conflicts of Laws rules [*Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)]. The Georgia conflicts of law rule concerning the validity and interpretation of contracts made in another state provides the law of the state where the contract was made and performed will govern except when the result is contrary to the public policy of the State of Georgia. *Cox v. Adams*, 2 Ga. 158, 165 (1847); *Tillman v. Gibson*, 44 Ga. App. 440, 442, 161 S.E. 630, ____ (1931). The Georgia state courts would apply California law in this case not only because the contract was made and performed in California, but also because the parties specifically agreed in the contract that California law would

control.

12. The contract before the Court is in all material respects identical to the contract ruled on by the California Court of Appeals in *Delta v. Douglas, supra*. That case, which Delta unsuccessfully sought to have reviewed by the California Supreme Court, is the law of California so far as the matters at issue here are concerned. Accordingly, this Court must uphold the validity of the exculpatory clause contained in the Warranty Article of the contract before the Court.

Thus, Delta's causes of action sounding in "negligence" and "strict liability in tort" are DISMISSED. Delta's causes of action based on the validity of the Warranty Clause, which is hereby upheld as a matter of law, and recovery thereunder, are reserved for determination by jury trial pursuant to the limited waiver of jury trial referred to above.

SO ORDERED, this 30 day of October, 1972.

/s/CHARLES A. MOYE, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Delta Air Lines, Inc.,	)	
Plaintiff	)	
v.	)	**Civil Action No. 13768**
McDonnell Douglas Corporation,	)	
Defendant	)	

ORDER

On October 30, 1972, this Court dismissed Delta's claims based on negligence and strict liability in tort but did not rule on its claims based on implied and express warranty. The Court's order was based on its nonjury consideration of certain issues following a limited waiver by the parties of trial by jury.

Defendant, McDonnell Douglas, has moved the Court to amend that order so as to also dismiss the implied warranty claim and to exclude "consequential damages" from the express

warranty claim. In response, Delta contends that this additional relief sought by defendant is improper because it would force the court to consider issues on which Delta did not waive trial by jury. Accordingly, the Court is unwilling to go beyond an interpretation of the nonjury issues and consequently denies defendant's motion.

In an attempt to obtain the right to an immediate appeal of this Court's order of October 30, 1972, Delta has moved the Court to amend that order in one of the following ways:

(1) to include a determination "that there is no just reason for delay" and to direct the entry of a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure or

(2) to permit an interlocutory appeal of a controlling question of law.

Although that order used the phrase "cause of action" with respect to Delta's claims which were dismissed, it probably would be more appropriate to say that Delta has a single cause of action against the defendant for the damage to its aircraft, and that its complaint sets forth several different legal theories supporting that cause of action. Consequently, the Court is doubtful that a finding pursuant to Rule 54(b) would be appropriate, but the Court is of the opinion that its order of October 30, 1972, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from that order may materially advance the ultimate determination of the litigation [28 U.S.C. § 1292(b)]. Accordingly, the Court's order of October 30, 1972, is so amended.

This 22 day of November, 1972.

/s/CHARLES A. MOYE, JR.
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 31, 1974

Appeals from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and RONEY and GEE, Circuit Judges.

RONEY, Circuit Judge:

An aircraft purchased by Delta Air Lines, Inc. from McDonnell Douglas Corporation, the manufacturer, suffered damages when its nose gear collapsed during a landing in Jacksonville, Florida, because a component part was incorrectly installed. There were no personal injuries. Delta seeks to recover from McDonnell the expenses incurred in repair on four theories of liability: (1) negligence; (2) breach of implied warranties of merchantability and fitness for a particular purpose; (3) breach of express warranty; and, (4) strict liability in tort. The District Court dismissed the two counts sounding in negligence and strict liability on the ground that an exculpatory clause in the contract limited McDonnell's liability to contractual warranty provisions. Delta, in this interlocutory appeal, seeks review of the correctness of the Court's ruling in this regard. We affirm.

[1] By cross-appeal McDonnell seeks review of the District Court's refusal to dismiss the counts based on express and implied warranties. The District Court reserved decision as to these two counts pending trial. Accordingly, there is no decision on the attempted cross-appeal for us to review at this time. Assuming without deciding that the allowance of an interlocutory appeal was not improvident under these circumstances, we will review the validity and effect of the exculpatory clause only insofar as it presents a defense against the

counts for negligence and strict liability, the issues previously decided by the trial court.

The Purchase Agreement in question was signed at Long Beach, California, on November 18, 1964, and originally related only to the so-called "short" DC–8 aircraft, or Series 51 DC–8 aircraft. On August 13, 1966, at Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement, which amendment provided that additional DC–8 aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964, Purchase Agreement. The accident aircraft was one of the aircraft covered by Amendment No. 5.

Article 4 of the Purchase Agreement stated the aircraft would be manufactured and delivered in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." The Purchase Agreement also contained clauses which limited the agreements between the parties to the exact written terms of the contract.

At the time of the accident in question, Delta was operating the aircraft under a lease agreement with McDonnell Douglas Finance Corporation, but the lease was contemplated by the parties and they had agreed that the lease agreement would not abrogate or modify the provisions of the Purchase Agreement.

The Warranty Article in the Purchase Agreement, set forth in full in the margin,[1] contained the following exculpatory clause:

> (G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and

1. 12. WARRANTY.
(A) Subject to the limitations and conditions hereinafter set forth, seller warrants that the aircraft, accessories, equipment and parts supplied hereunder which have been manufactured by seller, and by other manufacturers if made to detailed design and detailed specifi-

buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with

cations originated by seller, shall at the time of delivery by seller be free from:

(1) Defects in material and workmanship furnished by seller and used in the fabrication thereof;

(2) Defects arising from the selection of material or process of manufacture;

(3) Defects inherent in the design thereof in view of the state of the art as of the date of such design;

(4) Defects arising from failure to conform to the detailed specifications of this purchase agreement except as to such portions thereof, if any, as are expressly stated to be not guaranteed.

(B) Defects in material and workmanship, defects arising from the selection of material or process of manufacture and defects arising from failure to conform to the detailed specifications, must become apparent in the aircraft, accessory, equipment or part within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

The extent of seller's liability under this warranty as to defects in material or workmanship, defects arising from the selection of material or the process of manufacture, and defects arising from failure to conform to the detailed specifications, is limited to the repair at its expense of such defects in the aircraft or to the repair or replacement at its expense (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

(C) The extent of seller's liability under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment or part purchased hereunder within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

(D) Seller shall make the foregoing repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft, system, accessory, equipment or part involved may not be kept out of service longer than necessary. Disassembly of the aircraft to correct the defect, removal of the defective or faulty structure, system, accessory, equipment, or new part and installation of the corrected or new structure, system, accessory, equipment or new part and re-assembly of the aircraft shall be at buyer's expense, unless such work is performed by seller at its factory at Long Beach, California, or unless buyer offers to return the aircraft, accessory, equipment or part and buyer and seller thereafter mutually agree that buyer will perform the work and that seller will pay buyer in whole or in part for removal, installation and re-assembly

respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by

of the aircraft. Cost of temporary or interim repairs, replacements and corrections accomplished by buyer, as well as any consequential cost related thereto, shall likewise be at buyer's expense, except when seller, in advance, approves in writing such temporary or interim repairs, replacements and corrections and the cost thereof, which cost seller may agree to pay in whole or in part.

(E) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

(1) The aircraft is operated with any accessory, equipment or part not specifically approved by seller and not manufactured by seller or to seller's design and specification unless buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

(2) The aircraft shall not have been operated or maintained in accordance with seller's instructions furnished under this agreement, unless buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

(3) The aircraft shall not have been operated under normal airline use, unless buyer furnishes reasonable evidence that such operation was not a cause of the defect;

(4) The aircraft shall have been repaired, altered or modified without seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accident shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made within suitable material and according to standard practice and engineering;

(5) Buyer does not (i) report the defect in writing or by telegram to seller's warranty administrator at its factory in Long Beach, California, within sixty (60) days following such defect becoming apparent to buyer as provided in paragraphs (B) and (C) above, and (ii) return the defective or faulty aircraft, accessory, equipment or part to said factory (or, if return to seller's factory is not feasible and seller so agrees in advance in writing, which agreement shall not unreasonably be withheld, to buyer's base repair shop or other appropriate facility in the United States) within sixty (60) days following the end of the applicable period of time specified in paragraphs (B) and (C) above, or within sixty (60) days following such defect becoming apparent, whichever is

seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect.

Amendment 5 incorporated the terms of the 1964 agreement, including the Warranty Clause, which terms were the subject of intensive negotiation. There was no substantial

earlier, and further provided that if, for reasons beyond buyer's control, return of the items to seller's factory is not possible within said sixty (60) day period, and if buyer so notifies seller in writing and seller so agrees in writing, which agreement shall not unreasonably be withheld, the said sixty (60) day period will be waived, but buyer must return the item to seller's said factory if, as and when said return does become feasible. Buyer also must submit reasonable proof to seller, within sixty (60) days after the defect becomes apparent (except when such period is waived) that the defect is due to a matter embraced within the seller's warranty hereunder. Seller shall approve or disapprove buyer's substantiated warranty claim in writing within sixty (60) days of receipt thereof. All such transportation, including return to buyer of the repaired, replaced or corrected aircraft, accessory, equipment or part shall be at buyer's expense.

With respect to matters made the subject of seller's approval under sub-paragraphs (1), (4) and seller's approval or disapproval of buyer's warranty claim under (5) of this paragraph (E), seller's approval or disapproval thereof shall be made in writing to buyer within sixty (60) days after buyer's written notice requesting approval is received by seller. In the event of disapproval, seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to buyer a written statement of approval or disapproval within such sixty (60) day period shall irrevocably and conclusively constitute approval by seller of the subject matter of the particular request involved.

(F) Normal wear and tear and the need for regular overhauls shall not constitute a defect or failure under this warranty. Buyer acknowledges that some of the accessories, equipment and parts warranted hereunder have a normal life expectancy that is less than the time period specified under paragraph (B) and (C) above.

(G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect.

imbalance in the bargaining positions of the parties and the Warranty Clause was not dictated by McDonnell on a "take it-or leave it" basis. Due to the California Court of Appeal decision in Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., 238 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965), rendered several months before the parties entered into the agreement in the instant case, Delta was aware that McDonnell would, under certain circumstances, agree to modification or elimination of the exculpatory clause, albeit for a price which Delta apparently did not wish to pay. *See* 238 Cal.App.2d at 103 n. 5, 47 Cal.Rptr. at 523 n. 5.

[2–4] The parties agree with the proposition that in this diversity case, we must follow state law,[2] including state conflict of law rules,[3] and that the Georgia conflicts rule provides that the law of the state where a contract is made and performed will govern the validity and interpretation of the contract except when the result is contrary to the public policy of the State of Georgia.[4] The Georgia state courts would apply California law in this case not only because the contract was made and performed in California, but also because the parties specifically agreed in the contract that California law would control.[5]

The chief point of disagreement between the parties that we are called upon to settle concerns what a California court would do with this case. This disagreement centers around the precedent established by Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., 238 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965), in the light of an earlier California Supreme Court case, Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.

2. Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

3. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

4. Cox v. Adams, 2 Ga. 158, 165 (1847); Goodman v. Nadler, 113 Ga.App. 493, 148 S.E.2d 480, 483 (1966).

5. *See* Barzda v. Quality Courts Motel, Inc., 386 F.2d 417 (5th Cir. 1967).

Rptr. 33, 383 P.2d 441 (1963), and a California statute dealing with exculpatory clauses, Cal.Civ.Code § 1668 (West 1972).

Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., *supra*, involved the validity, as between the same airline and the same manufacturer as the case at bar, of virtually identical warranty provisions in connection with an airplane accident also caused by a malfunctioning nose landing gear. The intermediate California Court of Appeal upheld the exculpatory clause in the contract as precluding a negligence suit brought by the airline against the manufacturer.

Faced with this strong indication of how a California court would decide this case, Delta makes essentially five arguments against that result, which we find unpersuasive. We address the arguments *seriatim* as presented in Delta's brief.

[5, 6] First, Delta contends that the exculpatory clause is in clear violation of the public policy of California as specifically set out in the statutes of that state because it would relieve McDonnell of responsibility for the violation of § 21.165 of the Federal Aviation Administration (FAA) regulations requiring it to determine that the aircraft was in a condition for safe operation. California Civil Code § 1668 makes it against the policy of the law for a contract to exempt anyone from responsibility for violation of the law.[6] Delta asserts that by delivering the plane with the nose gear part incorrectly installed, McDonnell violated the FAA regulation found at 14 C.F.R. § 21.165 (1974), which provides in effect that an airplane manufacturer must determine that any airplane proposed for certification is in a condition for safe operation.[7]

6. Cal.Civ.Code § 1668 provides:
   All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

7. Section 21.165 reads:
   The holder of a production certificate shall—
   (a) Maintain the quality control system in conformity with the data and procedures approved for the production certificate; and

Delta, however, confuses a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence, *see* Steel v. Downs, 438 F.2d 310, 316 (8th Cir. 1971), with the liability that may be imposed by law. McDonnell is still answerable to the FAA and third parties for any responsibility established by the regulation, and any statutory right of action that might be given to Delta by FAA regulations has not been abrogated. But none of these causes of action are involved in an action based on common law negligence. We are unable to agree that the contract between two industrial giants fixing the dollar responsibility for McDonnell's alleged negligence would be void under California law, any more than would be an insurance contract which might be written for the same purpose.

Second, and along the same lines as the first argument, Delta contends that this case is distinguishable from Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., because in that case the court did not consider the issue raised here with respect to the violation of § 21.165. The *Douglas* court, however, did reject an argument similar to the one asserted first by Delta, by finding that Douglas had not violated the regulations there in question. Delta argues that the clear inference from the case is that had such a violation been proved, the California Court would have held the exculpatory clause void under Section 1668. Since this case is at the pleading stage, Delta contends that it ought to be permitted to prove what it did not prove in the state case.

Although Delta is correct in contending that *Douglas* did not consider the issue raised here as to a FAA regulation violation, it is incorrect in asserting that the California Court conceded that if a violation of such a regulation had been shown the exculpatory clause would have been invalid under

(b) Determine that each completed product submitted for airworthiness certification or approval conforms to the type design and is in a condition for safe operation.

California law. The total comments in the opinion relating to this argument about Section 1668 leave no inference whatsoever as to how the court would have handled the argument had Douglas violated the regulations. *See* 47 Cal.Rptr. at 525. With the *Douglas* case providing no guidance, we feel our analysis of Delta's first point applies equally to this point, and Delta's argument fails.

Third, Delta argues that even if Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc. were not distinguishable, the court in that case did not correctly apply the law of California as set out in the leading cases of that state. Instead, Delta asserts, that court misinterpreted and incorrectly applied the law, while the duty of the court below in this case was to apply the law of California correctly, and not just to follow the *Douglas* case. And since that case was not a correct interpretation of the law, the District Court was bound to follow the law set out in the statutes and other decisions of California.

In this argument, Delta stresses the case of Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). In *Tunkl,* the Supreme Court of California held that release from liability for future negligence imposed as a condition for admission to a charitable research hospital was invalid on the ground that the agreement affected the public interest. The court reviewed a variety of exculpatory clause cases and concluded that an exculpatory provision can only be valid if it does not affect the "public interest." The *Douglas* court dealt specifically with *Tunkl* and its analysis of California law, and concluded in a very thorough discussion, that the contract between the airline and the manufacturer was not clothed with the kind of public interest that surfaced in a contract between a patient and a hospital. Based on the reasoning in the *Douglas* opinion, we are convinced that California law was correctly applied there. What may be more important in addressing the plaintiff's contention is that under Erie R. R. v. Tompkins, *supra,* we are bound to follow state law, whether or not we agree with the

reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. Delta has not cited us to any subsequent California decisions criticizing, distinguishing, or modifying the *Douglas* case. Therefore, *Douglas* remains the latest, most authoritative expression of California law applicable to the facts of this case. It is controlling for our purposes. *See* Ford Motor Co. v. Mathis, 322 F.2d 267, 269 (5th Cir. 1963).

Fourth, Delta contends that even if the court below correctly determined that the exculpatory clause is valid under the law of California, the clause violates the public policy of Georgia and should not be enforceable as a defense to Delta's complaint by a federal court sitting in Georgia.

To support this argument, Delta cites only a Georgia statute similar to Cal.Civ.Code § 1668.[8] The argument fails to carry the point for the same reasons that made the position untenable as a matter of California public policy.

[7] Finally, as to the dismissal of the strict liability count only, Delta makes this argument: The count based upon strict liability in tort is not barred by the exculpatory clause (even if valid) because one of the basic reasons for the development of the theory of strict liability is to transcend technical bases for denying liability where the product involved is unreasonably dangerous to the public. Contractual attempts to restrict liability are therefore immaterial in strict liability cases.

Although McDonnell argues in response to this that strict liability does not apply to factual circumstances such as these, we do not have to rule on this argument because we agree with McDonnell's contention that the exculpatory clause is broad enough to include the concept of strict liability in tort.

8. Ga.Code Ann. § 20-504 provides:

> A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty. . . .

Although the California Court of Appeal did not expressly mention strict liability in the earlier Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc. case, the holding by that Court is broad enough to encompass strict liability. In reaching its decision, the California Court cited and discussed Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963), the landmark California case dealing with the concept of strict liability in tort, and expressly held: "Even though disclaimer clauses are to be strictly construed, still we find that this clause covers not only contractual warranty liability but also tort liability." 238 Cal.App.2d at 101, 47 Cal.Rptr. at 522. The doctrine of strict liability is a tort concept, and the statement by the California Court that the exculpatory clause is broad enough to encompass "tort liability" as well as other forms of liability clearly indicates that strict tort liability has been disclaimed. Any other conclusion would emasculate the basic purpose of the Warranty Article and exclupatory clause.

Finding no persuasive arguments that militate against following this remarkably similar California case, we affirm the dismissal of the two counts in negligence and strict liability as being barred by the exculpatory clause in the contract under the authority of Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., *supra.*

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1973

No. 73-1799

D. C. Docket No. CA 13768

DELTA AIR LINES, INC.,
Plaintiff-Appellant-Cross Appellee,

versus

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee-Cross Appellant.

Appeals from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, and RONEY and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant-cross appellee pay to defendant-appellee-cross appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 31, 1974

Issued as Mandate: December 26, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1799

DELTA AIR LINES, INC.,
Plaintiff-Appellant-Cross Apellee,

versus

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee-Cross Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING
(December 17, 1974)

Before BROWN, Chief Judge, RONEY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

2815 East Spring Street
Long Beach, California 90806

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

April 24, 1969

McDonnell Douglas Corporation
Douglas Aircraft Company
3855 Lakewood Boulevard
Long Beach, California 90801

Attention: Mr. W. F. Stryker, Director Reliability and Quality Assurance

Gentlemen:

On January 31, 1969, Delta Air Lines DC-8-61 aircraft, Registration No. N1302L, Serial No. 46029, experienced collapse of its nose landing gear while landing at Jacksonville, Florida. Subsequent investigation indicated that taper bolts, P/N 4716811-501, had been installed by Douglas Aircraft Company in the upper cross tube assembly only, and not through the cross tube bearings, P/N 4771383-501A. McDonnell Douglas Corporation, Douglas Aircraft Company, took immediate corrective action by reinspecting all production aircraft before delivery to the airlines and, in addition, revised DC-8 and DC-9 Assembly Outlines. The DC-8 Assembly Outline 310M7100-210, Edition 24, and DC-9 Assembly Outline 474-4325-2, Edition 19, were issued with the addition of applicable reference drawings, and a special attention note to the drawing view showing proper installation of the taper bolts through bearings.

The circumstances indicate that McDonnell Douglas Corporation, Douglas Aircraft Company, holder of Production Certificate No. 27, were in violation of Federal Aviation Regulations 21.165 (b) in that they failed to determine that each completed

product submitted for airworthiness certification conforms to the type design and is in a condition for safe operation.

After our subsequent discussions with you concerning this discrepancy, and the action taken by your company to preclude any future occurrence of this nature, we have concluded that no further enforcement action is necessary as a result of this incident. In lieu thereof, we are issuing this official reprimand which will be made a matter of record. You may consider this matter closed.

Sincerely,

/s/ JOHN B. BARNARD
JOHN B. BARNARD
Supervising Inspector
WE-AEDO-48

RECEIVED BY DIRECT MAIL.
CERTIFIED # 425534

Note: Incident previously reported by FAA Miami ltr dtd 2-4-69.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 1

I. Pertinent Accident Facts Omitted From Delta's Petition 2

II. The Contract Documents 5

III. Delta's Position As A Contracting Party 8

IV. The History Of The Contract Negotiations 11

REASONS FOR DENYING DELTA'S PETITION 17

I. Federal Aviation Regulations And Aviation Safety Are Not Affected By The Warranty Article And Exculpatory Clause 17

II. The Decision Below Is Correct And Conforms To California Law 23

CONCLUSION 28

CERTIFICATE OF SERVICE 29

APPENDIX A—The Warranty Article a-1

APPENDIX B—Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., 231 Cal. App. 2d 95, 47 Cal.Rptr. 518 (1965) b-1

TABLE OF AUTHORITIES

Cases: **Page**

All-Co Drainage & Building Products, Inc. v. Umstead Enterprises, Inc., 123 Ga.App. 244, 180 S.E.2d 250 (1971) 27

Andrews Motors Co. v. Clement, 127 Ga.App. 745, 195 S.E.2d 249 (1972) 26

Artukovich v. Pacific States Coast Iron Pipe Co., 78 Cal.App. 1, 176 P.2d 962, 965 (1947) 25

Brown v. Five Points Parking Center, 121 Ga.App. 819, 175 S.E.2d 901 (1970) 26

Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., 231 Cal.App. 2d 95, 47 Cal.Rptr. 518 (1965) 3, 18, 21, 23, 27, 28

Dowman-Dozier Mfg. Co. v. Central of Georgia Ry., 29 Ga.App. 187, 114 S.E. 815 (1922) 26

Erie R.R. v. Tompkins, 304 U.S. 64 (1941) 28

Hawes v. Central of Georgia Ry., 117 Ga.App. 771, 162 S.E.2d 14 (1968) 26

Hischemoeller v. National Ice and Cold Storage Company of California, 46 Cal.2d 318, 294 P.2d 433 (1956) 25

King v. Smith, 47 Ga.App. 360, 170 S.E. 546 (1933) 26

Louisville & Nashville R.R. v. Atlantic Co., 66 Ga.App. 791, 19 S.E.2d 364 (1942) 26

Rogers-Farmer Metro Chrysler-Plymouth, Inc. v. Barnett, 125 Ga.App. 494, 188 S.E.2d 122 (1972) 26

TABLE OF AUTHORITIES (Continued)

Page

Stephens v. Southern Pacific Co., 190 Cal. 86, 41 P. 783 (1895) 21

Tunkl v. Regents of the University of California, 312 Cal.Rptr. 33, 383 P.2d 441 (1963) 21, 25

Statutes:

California Civil Code § 1668 ..... 24, 25, 27

Ga. Code Ann. § 109A-2-719 27

Regulations:

14 C.F.R. § 21.165 24

Miscellaneous:

Disclaimers of Warranty In Consumer Sales, 77 Harv. L. Rev. 318 (1963) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

BRIEF OF McDONNELL DOUGLAS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent McDonnell Douglas Corporation ("MDC") respectfully submits this Brief in opposition to the petition for writ of certiorari filed by petitioner Delta Air Lines, Inc. ("Delta"), and for the reasons stated herein urges this Honorable Court to deny Delta's petition.

STATEMENT OF THE CASE

Delta has not supplied the Court with a full and correct statement of the case. For this reason MDC is setting forth below its own statement of the case.

I. Pertinent Accident Facts Omitted From Delta's Petition.

In its petition Delta refrained from mentioning several pertinent facts concerning the accident in question.

First, at the non-jury trial held in the District Court with respect to the validity and applicability of the warranty article and exculpatory clause contained in the Aircraft Purchase Agreement, the parties agreed that the evidence indicated that the cause of the nose landing gear collapse was an incorrectly installed component part of the nose landing gear assembly. 350 F.Supp. 739.[1] Therefore, the type of alleged "defect" in question is one of the "defects in workmanship" expressly mentioned in the warranty article, and with respect to which the warranty article expressly provides certain remedies and limitations. (The warranty article is attached as Appendix A.)

In other words, in negotiating the Aircraft Purchase Agreement the parties specifically agreed on the rights and remedies and liabilities of each party in the event of a defect such as the one involved here.

Second, there were no personal injuries of any type in the incident in question, and contrary to Delta's innuendoes the rights of innocent passengers or the public at large are in no way involved in this case and will not be affected in the least by the outcome of this case.

Third, MDC did not contend and does not now contend that the warranty article and exculpatory clause

[1] Each party accuses the other of installing the part incorrectly. Alternatively, MDC says that Delta should have discovered the incorrect installation prior to the accident.

insulate MDC from passenger claims or any other claims asserted by the public at large.

To the contrary, it has been the law of the land for years that passengers and other members of the public at large "are not parties to the contract and their rights would not be compromised. They retain their rights to bring a direct action against Douglas. . . ." *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 231 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965). (Copy of this decision is attached as Appendix B for convenient reference.)

Moreover, the aircraft purchase agreement does not require Delta to indemnify MDC for passenger claims filed because of MDC's negligence.

This case therefore simply does not involve the "public interest" repeatedly referred to by Delta in its petition.

Fourth, contrary to Delta's statements in its petition, MDC does not contend that Delta has no remedy for any alleged wrongdoing on MDC's part. MDC contends simply that any claim Delta may have is governed by the terms of the warranty article negotiated and agreed to by the parties.

Last, Delta has admitted that its damage claim against MDC is composed of the following items (R. 307, 593, 670):

Alleged Actual Repair Costs:		
Labor	$14,257.68	
Overhead (150% of Labor)	21,386.52	
Expense Statements	292.61	
Car Rental	67.42	
Photographs	482.56	
Parts and Materials	28,577.53	$65,064.32
Alleged Additional Estimated Repair Costs on Nose Gear:		
Parts, Materials and Supplies	$14,778.00	
Labor—400 hours at $4.38	1,752.00	
Overhead	2,628.00	
Contingent Additional Costs of $30,000 if Nose Gear Side Braces, Piston, Drag Links and Retract Strut are Damaged Beyond Repair	30,000.00	$49,158.00
Alleged Ferry Flights (Ferry Damaged DC-8 to Atlanta from Jacksonville and Another DC-8 to Jacksonville to Replace Damaged Aircraft):		1,622.00
Alleged Loss of Use:		87,500.00
TOTAL ALLEGED DAMAGES;		$203,344.32

From even a casual perusal of Delta's itemization of alleged damages it is obvious that Delta is not making and has never made a legitimate claim *under* the terms of the warranty article. To the contrary, Delta has asserted a claim for damages *outside* the warranty article.

II. The Contract Documents.

Examination of all of the relevant contract documents is helpful in arriving at an understanding of the basic issues involved in this case.

The Purchase Agreement in question was entered into at Long Beach, California on November 18, 1964 and in its original form related only to the so-called "short" DC-8 aircraft, or Series 51 DC-8 aircraft. (R. 64) On August 13, 1966, in Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement, which amendment provided that additional DC-8 aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964 Purchase Agreement. The accident aircraft was one of the aircraft covered in Amendment No. 5. (R. 109) The basic Purchase Agreement, exclusive of the numerous exhibits, change orders, amendments and side letter agreements, totaled 44 pages in length, and the basic price of the accident aircraft, excluding extra and other charges, was $8,479,833.00. (R. 112)

Articles 2 and 7 and Exhibit "A" of the Purchase Agreement provided that manufacture of the aircraft would be according to detailed specifications submitted by Delta. (R. 68, 82) In effect, the accident aircraft was to be tailored to Delta's particular needs and require-

ments, as outlined to MDC by Delta. Delta was given in Article 3 of the Purchase Agreement the right to inspect any part of the manufacturing process and any part of the aircraft itself during the manufacturing process. Article 3 of the Purchase Agreement also gave Delta the right to participate as an observer in MDC's own flight testing of the aircraft, and Article 3 specifically required Delta to technically approve the aircraft prior to actual delivery. Article 4 placed on MDC the risk of any loss or damage to the aircraft prior to actual delivery to Delta. (R. 69-75)

The Purchase Agreement also provided in Articles 13 and 14 that MDC would hold Delta harmless from patent infringement or other similar claims. (R. 99) Reciprocal hold harmless agreements were included in Article 3 of the Purchase Agreement (R. 69) with respect to liabilities that might be incurred during flight testing.

Article 4 provided that manufacture and delivery of the aircraft would take place in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." And "entire contract," "parol evidence" and "merger" clauses were contained in Article 17 of the Purchase Agreement. (R. 74, 106)

It is pertinent to this case that in Paragraph No. 8 of Amendment No. 5 of the Purchase Agreement, the parties on August 13, 1966 expressly agreed:

> "By the execution hereof *the parties hereto agree that all of the terms of the purchase agreement shall remain in full force and effect* except as herein expressly changed, modified or supplemented, or

> except insofar as the terms have been completed, performed, or complied with prior to the date hereof." (Emphasis added.) (R. 118)

Amendment No. 5 in no way "changed, modified or supplemented" the Warranty Article, exculpatory clause and limitations of liability contained in the Purchase Agreement, and in executing Amendment No. 5 on August 13, 1966, the parties expressly stipulated and agreed that the Warranty Article, including the exculpatory clause and limitation of liabilities, would "remain in full force and effect."

Pursuant to the provisions of Amendment No. 5 of the Purchase Agreement, Delta exercised an option to lease the accident aircraft for the first twelve (12) months after delivery, or from January, 1969 to January, 1970. Of particular importance to the issues involved in this litigation is the fact that in Paragraph 29 of the Lease Agreement Delta and MDC specifically agreed (on January 16, 1969):

> "*This lease agreement does not modify or render ineffective or inapplicable any provisions of purchase agreement* DAC 64-110-D, as amended, and its other exhibits, *including specifically Article 12 [the warranty article] of the purchase agreement,* except as specifically provided herein." (R. 136)

Thus, as late as January 16, 1969, Delta and MDC re-affirmed their intent to be bound by the provisions of the Warranty Article contained in the original Purchase Agreement, including the exculpatory clause and limitations of liability.

Delivery of the accident aircraft to Delta by MDC took place on January 16, 1969 at Long Beach, California and is evidenced by a "Packing Sheet" signed

by MDC and Delta in California on that date. (R. 146) In signing the Packing Sheet and in accepting delivery of the aircraft, Delta expressed its technical approval of the aircraft and re-affirmed its contractual commitment and intent to be bound by the terms and provisions of the Warranty Article in the Purchase Agreement, in the event of a defect in the aircraft. To be precise, the Packing Sheet signed by Delta on January 16, 1969 contained the following express agreement:

> "Delta hereby technically approves this aircraft *and waives all remedies as to the condition thereof,* including the remedy of rejection after delivery, *excepting only those remedies provided for in the article of the above described purchase agreement entitled 'Warranty'* and those items under attachments A and B to this packing sheet *and agrees that said aircraft otherwise has been manufactured in accordance with and physically conforms to the requirements of said purchase agreement,* as so amended, *and the detailed specification* DS-3016 as defined therein. . . . Receipt of the above identified aircraft is hereby also acknowledged." (R. 146)

From the foregoing it is obvious that the contract documents in question were not "boilerplate" forms, but were complex agreements which attempted to spell out *all* of the rights and duties of the parties and which contained detailed provisions specially tailored to fit the individual needs and requirements of both parties to the bargain.

III. Delta's Position As A Contracting Party.

It is important to consider in some detail Delta's strength and bargaining power and position (a) at the time the original contract was entered into (November 18, 1964), (b) at the time Amendment No. 5 adding

the accident aircraft was entered into (August 13, 1966 —at which time Delta re-affirmed its commitment to be bound by the provisions of the Warranty Article) and (c) at the time the Lease Agreement and Packing Sheet were executed (January 16, 1969—at which time Delta twice re-affirmed its intention to be bound by the provisions of the Warranty Article).

Mr. Jack Hall, former Chief Counsel of Douglas Aircraft Company (now a division of MDC), and other witnesses testified at trial that during the period of time in question Delta was a major airline and major customer of MDC, and that Delta bought a lot of equipment from MDC. The evidence also shows that Delta was a valuable and important customer of MDC, and one that MDC wanted to keep satisfied as much as it could. (R. 942)

MDC's Director of Commercial Contracts Administration testified that during the years in question four-engine commercial jets other than the DC-8 were available from competitors of MDC. The Boeing 707 and Convair 880 aircraft were given as examples, and it was pointed out that MDC lost some DC-8 sales to airlines (including Delta) that purchased Convair 880's, Boeing 707's and other four-engine jets manufactured by MDC's competitors. (Vening Depos., pp. 34-36)

Delta's Vice-President admitted that Delta was the only major airline that did not operate Boeing 727 (three engine) and 707 (four engine) jet aircraft and other types of large jet aircraft; that most other major airlines (TWA, Braniff, Pan Am, Eastern, National, American, etc.) operated three and four-engine jets manufactured by competitors of MDC; that many of Delta's major competitors did not operate the "stretched"

DC-8 in domestic service; and that many of Delta's major competitors operated jets manufactured by competitors of MDC along routes identical with Delta's routes, in direct competition with Delta. (R. 1045-1060) He also stated that Delta considered the large three and four-engine jets manufactured by MDC's competitors to be safe aircraft, and that it would be possible (but perhaps not as profitable) for Delta to operate along its route system with the large three and four-engine jets that were available from MDC's competitors. (R. 1049)

Delta's Annual Reports for the years 1963-1969 are in evidence and reveal that based on the accepted yardstick of revenue passenger miles Delta was the seventh largest airline in the world in 1963. (R. 374) In 1966 Delta was the fifth largest commercial airline in the United States. (R. 439) And in 1965 Delta boarded 1,000,000 passengers more than its nearest competitor. (R. 414) Also, Delta's witnesses testified that Delta had shown profits for thirty years. (R. 1046, 1065)

Although Delta was the first commercial airline to put the DC-8 four-engine jet manufactured by MDC into commercial service, Delta was also the first airline to operate in commercial service the Convair 880 four-engine jet, manufactured by a competitor of MDC. In this regard, it should be noted that Delta purchased from a competitor of MDC at least 16 Convair 880 four-engine jet aircraft under purchase contracts *that did not contain exculpatory or limitation of liability clauses relieving the manufacturer from liability to Delta for the manufacturer's own negligence.* (R. 1000) And in 1963 and 1964 Delta actually operated more Convair 880 four-engine jets than DC-8 four-engine jets manu-

factured by MDC. It was not until 1965 that Delta operated as many DC-8 four-engine jets as Convair 880 four-engine jets. (R. 423)

This evidence establishes that genuine competition existed among the manufacturers of large three and four-engine jets during the period of time in question, that Delta occupied an important and strong position in the field of commercial aviation, that Delta was by no means an economic weakling, that large passenger-carrying jets other than the "stretched" DC-8 were available to Delta and could have been purchased by Delta,[2] and that Delta was under no "compulsion" to purchase the aircraft in question.

IV. The History Of The Contract Negotiations.

In its petition Delta carefully made no mention at all of the negotiations that culminated in the contract, warranty article and exculpatory clause in question. A review of such negotiations is essential to proper determination of this case.

With respect to the manner in which MDC aircraft purchase agreements in general are negotiated, the Branch Manager of Commercial Contracts for MDC explained:

> "A. . . . you have got to look a little bit at how a purchase agreement is negotiated. Normally the sales department approaches a customer and there —there is quite a bit of negotiation—I think you could call it back and forth—before any document is really—purchase agreement is written. Once certain parameters, I guess you would call them, have been established, we are requested to pre-

[2] Under purchase agreements that did not exculpate the seller from liability for negligent manufacture.

pare a draft of an agreement as a part of a total proposal for any given number of aircraft. This is normally where we [the MDC contract department] get into the picture. From that point on, we are generally a part of the negotiations, and once the terms of any given agreement are settled and arrived at, it's our responsibility to get them on paper, and we normally present them to the customer, although this is not a hard and fast rule either, if somebody like a vice president of sales may take the final draft of a purchase agreement to the customer, and I think what I am trying to say is that *the negotiation may go across several levels of authority and responsibility in both companies.*" (Maas Depos., pp. 20-21)

The MDC Manager of Commercial Contracts testified that all aircraft purchase agreements are unusual and that none of them are identical. He also explained that the purchase of commercial aircraft such as the one involved in this case was the subject of much negotiation and that most generally both the buyer and the seller employed negotiating teams composed of representatives from their respective contract, legal, sales and engineering departments. (Zimmerman Depos., p. 15)

He further testified that MDC developed a form of a purchase agreement that was presented to potential customers as a basis for kicking off negotiations concerning the purchase of aircraft, but that such initial form of agreement was modified greatly through negotiations between the various teams representing the buyer and seller. (Zimmerman Depos., pp. 10 and 24) The following testimony is most illustrative of the negotiating process:

"Q. . . . Mr. Zimmerman, the phrase 'contract negotiations,' and the phrase 'negotiating contracts and negotiators,' and 'negotiating team' has been

mentioned during your examination. Would you explain for the Court and possibly the jury what contract negotiations are with respect to purchase of aircraft, and is it like buying a pair of shoes from a department store? Is it that type of negotiation?

"A. No.

"Q. Well would you just explain it fully?

"A. Each negotiation is unique in that there is an offering of an airplane at a related price to a specification with an assigned delivery schedule. Basically that's what sells the airplane, coupled, of course, with the technical studies it gives with it, the seat amount cost and those kinds of engineering studies, performance. The customer or potential buyer is then convinced that this fulfills a capacity for him or requirement for him. He enters into negotiations for the then related terms and conditions for the contract, the so-called what we might say as boiler plate, if there could be such a term, and basically what you do, you present him with a contract consisting of standard terms and conditions, as standard as you can have them, and the basis upon which you negotiate, *and you start from the front of the contract, and it is a back and forth trade-off type of consideration that takes place in terms of time, anywhere from a few days to several weeks.*

"Q. *And sometimes during these negotiations are these so-called standard provisions changed, deleted, modified, or revised?*

"A. *They are sometimes all three, modified, changed and revised.*

"Q. *Would that include also the warranty article and the exculpatory clause that has been mentioned?*

"A. *They have been revised.* They have been talked about many times.

"Q. In the discussions with carriers?

"A. In the discussions with carriers."
(Zimmerman Depos., pp. 23-24) (Emphasis added)

MDC's Director of Commercial Contracts Administration pointed out that Delta's Legal Department assisted Delta in negotiating aircraft purchase agreements:

"Q. What type of personnel would compose the negotiating team for an airline?

"A. Top management. Sometimes they bring their lawyers and sometimes they don't bring their lawyers." (Vening Depos., p. 29)

This evidence confirms that aircraft purchase agreements, including the one at issue here, are the subject of much negotiation and that the negotiating teams are composed of high-level representatives from the various departments of each company.

Turning now to the negotiations concerning the warranty article and exculpatory clause in question, the testimony adduced at the special non-jury trial establishes that the limitations of liability and exculpatory clause in the Warranty Article were related to MDC's product liability insurance coverage and played an important role in determining the total purchase price of DC-8 aircraft. Inclusion of the clauses in the Purchase Agreement created an economic limit on the amount of MDC's hull loss liability exposure, thereby resulting in reduced product liability insurance premiums, which reduction in insurance costs was passed on to the customer as a lessening in the aircraft purchase price. Conversely, if the clauses were deleted from a purchase agreement through negotiations, the purchase price of the aircraft had to be increased suffi-

ciently to compensate for the additional product liability insurance expense factor involved in the overhead of producing the aircraft. (R. 946-968)

Several MDC witnesses testified that during contract negotiations MDC advised prospective customers of the relationship among the exculpatory clause and limitations of liability on the one hand and MDC's liability insurance costs and aircraft overhead costs on the other hand. (R. 951, 1021) Delta witnesses admitted that during negotiations on the Warranty Article in question Delta was advised of the manner in which the exculpatory clause and limitations of liability affect MDC's insurance program and the overall costs or overhead involved in producing DC-8 aircraft. (R. 1006, 1079)

MDC also presented positive evidence that the clauses in question were open to negotiation and that through negotiation the clauses were sometimes omitted from purchase agreements, provided the customer paid the increased overhead cost incurred by MDC having to purchase additional product liability insurance.

For example, Mr. Vening of MDC testified that in a DC-9 contract signed *four months prior* to the purchase agreement in question TWA and MDC agreed to delete the exculpatory clause in exchange for a $7,724.00 increase in the aircraft purchase price to offset the increased overhead. (Vening Depos., pp. 13-23)

And Mr. John Carroll of MDC testified that during negotiations with TWA and American Airlines on DC-10 aircraft MDC agreed to delete the exculpatory clause in exchange for a $15,000.00 per aircraft price increase to offset the increased overhead cost incurred

by purchasing additional product liability insurance. (R. 1024, 1037-38) [For reasons not relevant here TWA ultimately decided not to purchase DC-10 aircraft. American Airlines did purchase DC-10 aircraft without the exculpatory clause, but instead of increasing the aircraft purchase price MDC and American apparently "traded off" on other contract provisions, to the benefit of MDC. (R. 1042-43)] In the Trial Court Delta complained that MDC never offered a specific price for the deletion of the exculpatory clause, but MDC witnesses explained (and Delta witnesses admitted) that Delta never asked MDC for a specific price or cost figure for the deletion. (R. 1080) To compute the cost for the deletion, MDC would have to consult with its insurance underwriters and brokers. (R. 1021-22) And Delta witnesses admitted that MDC was never asked to consult with its insurance underwriters regarding the cost of deletion. (R. 1080) *In fact, Delta's Senior Vice President-Legal testified at trial that Delta wanted the clauses deleted "for nothing" or for free.* (R. 1081)

The evidence also establishes that Delta had full knowledge of the import and meaning of the Warranty Article and limitations of liability and exculpatory clause prior to entering into the Purchase Agreement in question. For example, in February, 1963, MDC's legal department wrote to Delta's legal department and explained the significance of the exculpatory clause. (R. 1040) Moreover, prior to entering into the Purchase Agreement in question Delta was involved in litigation with MDC concerning the validity and scope of an exculpatory clause and limitations of liability identical with the ones involved here. See *Delta v. Douglas Aircraft Company, supra.* This case was tried in September,

1963,—more than a year *prior* to execution of the Purchase Agreement in question here,—and the decision of the California Court of Appeals was handed down on November 9, 1965,—almost a full year *prior* to execution of Amendment No. 5 to the Purchase Agreement (adding the accident aircraft).

Based on the foregoing evidence and other evidence in the Record, it is clear that the contract terms in issue *were legitimately related to the overall cost of DC-8* aircraft, that the terms were open to negotiation, and that Delta was not "compelled" to accept or agree to such terms.

In effect, the sole question confronting the parties during the negotiations on the warranty article was an economic one: which party will bear the risk of certain types of economic loss occasioned by aircraft damage resulting from a defect in the aircraft? Delta chose to shoulder part of this economic risk in exchange for the specific warranty obligations imposed upon MDC in the warranty article and also in exchange for an aircraft purchase price that reflected a credit because of MDC's decreased product liability exposure. Such an agreement concerning economic loss risk shifting does not, contrary to Delta's suggestions, violate any "public policy" or increase the risk of aircraft accidents or encourage "careless" manufacture of aircraft.

REASONS FOR DENYING DELTA'S PETITION

I. Federal Aviation Regulations and Aviation Safety Are Not Affected By The Warranty Article and Exculpatory Clause.

As its first reason for the grant of writ of certiorari, and generally throughout its petition, Delta argues that

any effort to require it to honor and abide by its own solemn contractual commitments will in some way "undermine" Federal Aviation Regulations and aviation safety.

This argument is both absurd and totally unsupported by *any* evidence.

Neither the exculpatory clause, the warranty article nor any other provision of the aircraft purchase agreement even purports to "exempt" or relieve MDC from responsibility or liability to the F.A.A. or any other governmental agency for a violation of F.A.A. regulations or for any other "violation of law" or negligence. The F.A.A. and other governmental agencies are not prohibited by the exculpatory clause from imposing either civil or criminal penalties upon MDC for a "violation of law". In short, the F.A.A. and the Federal Aviation Regulations are not the least bit affected by the contract between Delta and MDC.

It must also be conceded that the exculpatory clause does not exempt or relieve MDC from responsibility or liability to passengers or other private third parties for a violation of F.A.A. regulations or for any other "violation of law" or negligence. As held in the earlier *Delta v. Douglas* case, *supra:*

> "The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against Douglas for negligence."

Moreover, the aircraft purchase agreement does not require Delta to indemnify or hold harmless MDC from any claims by passengers or other third parties.

Inasmuch as MDC admittedly has civil and criminal liability and responsibility both to the F.A.A. and to private third parties (*i.e.* the public at large) for any "violation of law" or negligence, the interest of the government and the public in aviation safety is in no way "undermined" or affected adversely by the Delta-MDC contract.

We turn now to the point we consider to be most important—namely, *the exculpatory clause does not exempt MDC from liability to Delta for a violation of law or for negligence.*

The exculpatory clause simply does not say that if MDC is negligent or violates the law Delta has no remedy.

Nor does the exculpatory clause say that MDC has no liability or responsibility whatsoever to Delta for a violation of law or for negligence.

Instead, the exculpatory clause plainly says:

> "(G) The warranty provided in this article *and the obligations and liabilities of Seller thereunder* are in lieu of and Buyer hereby waives all other . . . liabilities . . ."

This language simply does not constitute an "exemption" of liability for violation of law.

To the contrary, the above-quoted language clearly indicates that in the event of negligence or a "violation of law", *MDC has specific responsibilities and liabilities to Delta under the express terms of the warranty article.*

In short, the exculpatory clause in reality is neither a true "exculpatory" clause nor a true "risk-shifting" or "disclaimer" clause. *It is a risk-fixing clause, whereby Delta and MDC agreed in advance upon Delta's rights and*

MDC's obligations, responsibilities and liabilities in the event of a "violation of law" or other deficiency in performance on the part of MDC.

And the terms of this private risk-fixing agreement were voluntarily negotiated and agreed to by Delta in exchange (a) for an aircraft purchase price favorable to Delta, and (b) for the express written warranty obligations imposed on MDC.

These were not illusory or insubstantial considerations for either party.

For example, in a DC-9 contract signed four months before execution of the contract in question here, TWA and MDC agreed to delete the exculpatory clause, but the price of *each aircraft* was increased $7,724.00 to offset the increased overhead incurred by MDC having to purchase additional product liability insurance. (Vening depos. pp. 13-23).

And with respect to the substantial nature of the warranty obligations imposed upon MDC in the event of a "violation of law," we point out that MDC has already expended $2,141,000.00 on Delta DC-8 claims alone under the warranty article (exclusive of MDC's overhead and warranty administration expenses). (R. 1036)

Thus, insofar as the F.A.A., the public and even Delta are concerned, the object of the exculpatory clause is *not* to "exempt" or excuse MDC from liability or responsibility for a violation of law. To the contrary, the exculpatory clause serves only *to fix* MDC's obligations and liabilities *to Delta* (and not to anyone else) in the event of a violation of law.

Such a purely private risk-fixing agreement between two competent and equal bargainers does not violate the laws or policies of any state or of the United States Government.

As held in *Tunkl v. Regents of the University of California*, 32 Cal.Rptr. 33, 383 P.2d 441, 446 (1963):

> ". . . obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."

See also *Stephens v. Southern Pacific Co.*, 190 Cal. 86, 88, 41 P. 783, 784 (1895).

This Honorable Court is also referred to the holdings of the earlier *Delta v. Douglas* case, *supra:*

> "If the language used be broad enough, an actor may disclaim liability for negligence of any type. We cannot see, in the language herein involved and above quoted, anything to limit the obvious breadth of the word 'negligence' . . .
>
> * * *
>
> "As we have pointed out above, the elements of an adhesive contract and of inequality of bargaining are here absent. Nor, although it is true that the manufacture and operation of aircraft is a matter of federal regulation, do we here have the kind of 'public interest' to which the above quotation [from another case] refers . . .
>
> * * *
>
> ". . . The fact that Delta is a regulated enterprise and carries passengers has no relevance to the present decision . . .
>
> * * *

> "In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on Douglas (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to Douglas, which had neither agreed to assume it nor been compensated for such assumption."

Thus, we see that Delta's suggestion that voiding of the contractual terms in question would somehow increase aviation safety is nothing more than a last-ditch emotional appeal totally unsupported by evidence.

It is absurd to imply that a company such as McDonnell Douglas Corporation, which is engaged in the manufacture and sale of all types of civil and military aircraft and equipment to major airlines, other private entities and the United States government, is anything less than acutely safety-minded.

And if MDC should need any impetus towards "safety-mindedness" (which it certainly does not), then such impetus is amply provided by MDC's obligations and liabilities to the F.A.A., by MDC's exposure to liability claims from the "public," *and by the severe financial penalties imposed upon MDC by the terms of the express warranties it has given to Delta, in the event of a warranty breach.*

Nothing further need be said about Delta's "public interest" and "safety" arguments.

II. The Decision Below Is Correct And Conforms To California Law.

As its second reason for grant of a writ of certiorari, Delta says that both the Courts below and the California Court of Appeals in the earlier *Delta v. Douglas* decision, *supra*, "refused to follow the law of California."

With respect to Delta's argument that in the earlier *Delta* case the California Court of Appeals "refused to follow the law of California," MDC believes the California Court of Appeals is in a better position than Delta is to interpret California law, and that the interpretations of California law made by the California Court of Appeals in the earlier litigation are more authoritative than Delta's not unbiased opinions.

MDC also believes that if the decision in the earlier case were erroneous, the California Court of Appeals would not have denied Delta's petition for rehearing and the California Supreme Court would not have denied Delta's petition for certiorari in that case.

It is also worth noting that the scope and breadth of the earlier *Delta v. Douglas* decision has never been retreated from or in any way modified or distinguished by California courts, and that the earlier decision is today what it was in 1965,—*the law of California*.

The earlier *Delta v. Douglas* decision is a comprehensive and exhaustive judicial study of a warranty article and exculpatory clause substantially identical with the warranty article and exculpatory clause involved in the case at bar. And the material facts of the earlier case are identical in all respects with the material facts of this case. The conclusion is inescapable, therefore, that

the earlier case is a binding precedent and that the warranty article and exculpatory clause involved in this case are valid and enforceable.

Delta's argument that the Courts below refused to follow California law is based on Delta's premise that since it is alleged MDC violated a Federal Aviation Regulation (14 C.F.R. § 21.165) which required MDC to "determine that each aircraft submitted for an airworthiness certification . . . is in a condition for safe flight," the proper application of California Civil Code § 1668 requires a ruling that the exculpatory clause is void as being in violation of "public policy."

In connection with this premise Delta incorrectly characterizes the California statute as rendering void any contract which relieves a party from liability for violation of law. Delta then repeats the error by saying that the contract in question here relieves MDC of any liability for violation of law.

MDC wishes to set the record straight.

First, the California statute in question declares void only those contracts which have as their "*object*" the "exemption" of a person from responsibility or liability for "violation of law."

And second, the contractual agreements involved here plainly do not have as their "object" the "exemption" of MDC from either responsibility or liability for "violation of law." If MDC should "violate the law" or commit a negligent act, MDC would face both criminal and civil liability and responsibility to the F.A.A., liability and responsibility to respond in damages to any injured passenger or member of the public, and, most important, *liability to Delta according to the terms*

of the warranty article voluntarily negotiated and agreed to by the parties.

Clearly, therefore, California Civil Code § 1668 is not applicable here.

A review of California decisions confirms that California Civil Code § 1668 is not relevant here, and that the District Court and Circuit Court decisions below correctly conform to the law of California.

With respect to California's public policy concerning exculpatory clauses or contractual limitations of liability, attention is called to the ruling of the California Supreme Court in a case Delta attempts to rely upon, —*Tunkl v. The Regents of the University of California*, 60 Cal.2d 92, 383 P.2d 441, 446 (1963):

> ". . . no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. . . ."

Likewise, in *Artukovich v. Pacific States Coast Iron Pipe Co.*, 78 Cal.App. 1, 176 P.2d 962, 965 (1946), the California Court of Appeals said:

> "In California parties may agree by their contract to the limitation of liability in the event of a breach."

And in *Hischemoeller v. National Ice and Cold Storage Company of California*, 46 Cal.2d 318, 294 P.2d 433 (1956), the California Supreme Court upheld a limitation of liability provision with this ruling:

> "The facts in the present case disclose an ordinary business transaction between businessmen. There is no suggestion of short dealings or unfair practices on either side. Plaintiff bought what he

> paid for, and paid for what he bought. There appears to be no good reason for denying defendant the benefit of the limitation of liabilities set forth in the contract." 294 P.2d 433.

The law of California in this regard is in keeping with the "majority rule" regarding risk-fixing and risk-shifting agreements in a commercial (as opposed to consumer) setting. See *Disclaimers of Warranty in Consumer Sales*, 77 Harv. L. Rev. 318, 837 (1963), where the author noted:

> "A thwarting of the policies behind warranty need not attend recognition of disclaimers *in the commercial world*. There the buyer may be just as able to absorb and administer the inevitable risks of the seller's operations . . . There is common recourse to insurance . . . Buyers may even dictate the design, and thus be in a position to prevent the losses to which they are exposed. They are more capable of protecting themselves by caution and testing, and their own manufacturing processes and quality control systems stand between the object and ultimate users or bystanders." (Emphasis added.)

Georgia law on this subject is identical with the law of California. See *Andrews Motors Co. v. Clement*, 127 Ga.App. 745, 195 S.E.2d 249 (1972); *Rogers-Farmer Metro Chrysler-Plymouth, Inc. v. Barnett*, 125 Ga.App. 494, 188 S.E.2d 122 (1972); *Hawes v. Central of Georgia Ry.*, 117 Ga.App. 771, 162 S.E.2d 14 (1968); *Brown v. Five Points Parking Center*, 121 Ga.App. 819, 821, 175 S.E.2d 901 (1970); *Louisville & Nashville R.R. v. Atlantic Co.*, 66 Ga.App. 791, 797-805, 19 S.E.2d 364 (1942); *King v. Smith*, 47 Ga.App. 360, 364, 170 S.E. 546 (1933); and *Dowman-Dozier Mfg. Co. v. Central of Georgia Ry.*, 29 Ga.App. 187, 114 S.E. 815 (1922).

Cf., Ga. Code Ann. § 109A-2-719, which clearly authorizes contractual modifications or limitations of remedies, and *All-Co Drainage & Building Products, Inc. v. Umstead Enterprises, Inc.*, 123 Ga.App. 244, 180 S.E.2d 244 (1971), in which the Georgia Court of Appeals stated:

> "The UCC clearly contemplates that the method of computing a loss may be controlled by the agreement, in addition to *or in substitution of methods provided by statute.*"

(We do not mean to imply, however, that the UCC was in effect in California when Delta and MDC agreed upon the contractual terms in question here. See fn. 4 of the earlier *Delta v. Douglas* decision.)

For the reasons set forth above, Delta's allegations that "public policy" and California Civil Code § 1668 invalidate the exculpatory clause and limitations of liability contained in the aircraft purchase agreement are unfounded.

CONCLUSION

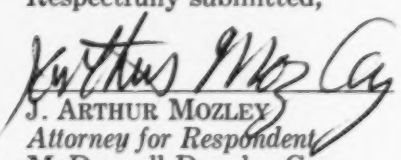
No statute, regulation or policy of the United States Government or of any state prohibits Delta and MDC from voluntarily agreeing—for a valuable consideration—to fix and limit between themselves only the risk of certain types of economic loss.

Delta's contention that the "negligence" portion of the exculpatory clause is violative of California public policy is answered succinctly by the decision in the earlier *Delta v. Douglas* case: "If the language used be broad enough, an actor may disclaim liability for negligence of any type." 238 Cal.App. 95, 101.

Consistent with the principles laid down by this Honorable Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1941), the Court below correctly ruled that the contractual agreements in question were valid and enforceable under California law.

Delta's petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. ARTHUR MOZLEY, attorney for respondent McDonnell Douglas Corporation and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of April, 1975, I served copies of the foregoing Brief upon all parties required to be served, by mailing three true copies of the foregoing Brief, correctly addressed and with the required postage prepaid, to the following attorneys of record for petitioner Delta Air Lines, Inc., in accordance with Supreme Court Rule 33:

Frank F. Rox
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

—and—

Robert Reed Gray
Hale, Russell & Stentzel
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

—and—

Robert S. Harkey
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

This 14th day of April, 1975.

Attorney of Record for Respondent
McDonnell Douglas Corporation

APPENDIX A

12. WARRANTY.

(A) Subject to the limitations and conditions hereinafter set forth, Seller warrants that the aircraft, accessories, equipment and parts supplied hereunder which have been manufactured by Seller, and by other manufacturers if made to detailed design and detailed specifications originated by Seller, shall at the time of delivery by Seller be free from:

(1) Defects in material and workmanship furnished by Seller and used in the fabrication thereof;

(2) Defects arising from the selection of material or process of manufacture;

(3) Defects inherent in the design thereof in view of the state of the art as of the date of such design;

(4) Defects arising from failure to conform to the Detail Specifications of this Purchase Agreement, except as to such portions thereof, if any, as are expressly stated to be not guaranteed.

(B) Defects in material and workmanship, defects arising from the selection of material or process of manufacture and defects arising from failure to conform to the Detail Specifications, must become apparent in the aircraft, accessory, equipment or part within one (1) year or two thousand (2000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

The extent of Seller's liability under this warranty as to defects in material or workmanship, defects arising from the selection of material or the process of manufacture, and defects arising from failure to conform to the Detail Specifications, is limited to the repair at its

expense of such defects in the aircraft or to the repair or replacement at its expense (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

(C) The extent of Seller's liability under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment or part purchased hereunder within one (1) year or two thousand (2000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

(D) Seller shall make the foregoing repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft, system, accessory, equipment or part involved may not be kept out of service longer than necessary. Disassembly of the aircraft to correct the defect, removal of the defective or faulty structure, system, accessory, equipment, or new part and installation of the corrected or new structure, system, accessory, equipment or new part and reassembly of the aircraft shall be at Buyer's expense, unless such work is performed by Seller at its factory at Long Beach, California, or unless Buyer offers to return the aircraft, accessory, equipment or part and Buyer and Seller thereafter mutually agree that Buyer will perform the work and that Seller will pay Buyer in whole or in part for removal, installation and reassembly of the aircraft. Costs of temporary or interim repairs, replacements and corrections accomplished by Buyer, as well as any consequential costs related thereto, shall likewise be at Buyer's expense, except when Seller, in advance, approves in writing such temporary or interim repairs, replacements and corrections and the costs

thereof, which costs Seller may agree to pay in whole or in part.

(E) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

(1) The aircraft is operated with any accessory, equipment or part not specifically approved by Seller and not manufactured by Seller or to Seller's design and specifications unless Buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

(2) The aircraft shall not have been operated or maintained in accordance with Seller's instructions furnished under this Agreement, unless Buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

(3) The aircraft shall not have been operated under normal airline use, unless Buyer furnishes reasonable evidence that such operation was not a cause of the defect;

(4) The aircraft shall have been repaired, altered or modified without Seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless Buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accidents shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made with suitable material and according to standard practice and engineering;

(5) Buyer does not (i) report the defect in writing or by telegram to Seller's Warranty Administrator at its factory in Long Beach, California, within sixty (60) days following such defect becoming apparent to Buyer as provided in paragraphs (B) and (C) above, and (ii) return the defective or faulty aircraft, accessory, equipment or part to said factory (or, if return to Seller's factory is not feasible and Seller so agrees in advance in writing, which agreement shall not unreasonably be withheld, to Buyer's base repair shop or other appropriate facility in the United States) within sixty (60) days following the end of the applicable period of time specified in paragraphs (B) and (C) above, or within sixty (60) days following such defect becoming apparent, whichever is earlier, and further provided that if, for reasons beyond Buyer's control, return of the item to Seller's factory is not possible within said sixty (60) day period, and if Buyer so notifies Seller in writing and Seller so agrees in writing, which agreement shall not unreasonably be withheld, the said sixty (60) day period will be waived, but Buyer must return the item to Seller's said factory if, as and when such return does become feasible. Buyer also must submit reasonable proof to Seller, within sixty (60) days after the defect becomes apparent (except when such period is waived), that the defect is due to a matter embraced within the Seller's warranty hereunder. Seller shall approve or disapprove Buyer's substantiated warranty claim in writing within sixty (60) days of receipt thereof. All such transportation, including return to Buyer of the repaired, replaced or corrected aircraft, accessory, equipment or part shall be at Buyer's expense.

With respect to matters made the subject of Seller's approval under subparagraphs (1), (4) and Seller's approval or disapproval of Buyer's warranty claim under (5) of this paragraph (E), Seller's approval or disap-

proval thereof shall be made in writing to Buyer within sixty (60) days after Buyer's written notice requesting approval is received by Seller. In the event of disapproval, Seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to Buyer a written statement of approval or disapproval within such sixty (60) day period shall irrevocably and conclusively constitute approval by Seller of the subject matter of the particular request involved.

(F) Normal wear and tear and the need for regular overhaul shall not constitute a defect or failure under this warranty. Buyer acknowledges that some of the accessories, equipment and parts warranted hereunder have a normal life expectancy that is less than the time period specified under paragraph (B) and (C) above.

(G) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guaranties or liabilities, express or implied, arising by law or otherwise (including without limitation any obligation of Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer; provided that in the event the provision relieving Seller from liability for its negligence should for any reason be held ineffective, the remainder of this paragraph (G) shall remain in full force and effect.

APPENDIX B

[231 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965)]

DELTA AIR LINES, INC.,

Plaintiff and Respondent,

v.

DOUGLAS AIRCRAFT COMPANY, INC.,

Defendant and Appellant.

Civ. 28225.

District Court of Appeal, Second District, Division 4, California.
Nov. 9, 1965.
As Modified on Denial of Rehearing Dec. 2, 1965.
Hearing Denied Jan. 6, 1966.

Action for breach of warranty in sale of commercial airplane. The Superior Court, Los Angeles County, Richard C. Fildew, J., entered judgment for plaintiff buyer, and the defendant seller appealed. The District Court of Appeal, Kingsley, J., held that exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence was not void as against public policy, where case involved no element of personal injury, privity of contract issue, or elements of inequality of bargaining.

Judgment reversed with directions.

1. Contracts Nos. 114, 189

Generally, exculpatory or indemnitory clauses attempting to free actor from liability for his own negli-

gence are basically valid but must be strictly construed, and failure to state attempted exculpation or indemnity in plain, unambiguous and clear terminology will result in interpretation that clause was not intended to exempt actor from liability for his own negligence.

2. Contracts No. 189

Contract must be interpreted by court and intent of parties determined, notwithstanding rule of strict interpretation applicable to exculpatory or indemnity clauses.

3. Contracts No. 189

Exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence covered not only contractual warranty liability of seller but also its tort liability.

4. Contracts No. 189

If language used in exculpatory clause is broad enough, actor may disclaim liability for negligence of any type.

5. Contracts No. 189

Exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence covered active as well as passive negligence of seller.

6. Contracts No. 114

Generally, law does not prohibit clear and express contract absolving actor from his own negligence. West's Ann.Civ.Code, § 1791; West's Ann.U.C.C. § 2316.

7. Sales No. 267

Exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence was sufficiently broad to disclaim implied warranty of fitness for buyer's purpose on which commercial airline company based its breach of warranty cause of action against seller of aircraft.

8. Contracts No. 114

Contract which exempts one from liability for his own negligence is not necessarily invalid.

9. Contracts No. 114

Exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence was not void as against public policy, where case involved no element of personal injury, privity of contract issue, or elements of inequality of bargaining. West's Ann.Civ.Code, § 1791; West's Ann.U.C.C. § 2316.

10. Contracts No. 114

Exculpatory clause contained in contract for sale of commercial airplane and providing that buyer waived all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence was not void, on ground that it attempted to exempt seller from liability for express violation of law relating to adjustments made to airplane prior to issuance of airworthy certificate, in absence of showing that adjustments were made prior to issuance of such certificate. West's Ann.Civ.Code, § 1668; Federal Aviation Act of 1958, § 101 et seq., 49 U.S.C.A. § 1301 et seq.

Belcher, Henzie & Biegenzahn, and Frank B. Belcher, Los Angeles, for defendant and appellant.

William G. Tucker, Richard T. Drukker, and Chase, Rotchford, Downen & Drukker, Los Angeles, for plaintiff and respondent.

KINGSLEY, Justice.

This is an action for breach of warranty in the sale of a commercial airplane. The buyer recovered judgment for damage to the airplane and the vendor has appealed. For reasons set out below, we conclude that the provisions of the contract of sale effectively insulated the vendor from the liability herein sought to be imposed on it and that the judgment against it must be reversed.

In October of 1955, Delta Air Lines, Inc. (Delta), the plaintiff herein, entered into a contract with defendant Douglas Aircraft Company, Inc. (Douglas) to purchase from the latter a new DC-7 airplane, at a price of $2,250,000. Delta received delivery of the airplane at Douglas' plant in Santa Monica, California, on November 25, 1957, and the plane was flown, by a Delta crew, to Atlanta, Georgia. Two days later, while a Delta crew was attempting to land the plane after a check flight, the nose wheel failed to function properly, causing the plane to veer off the runway with resultant damage to the craft. There were no personal injuries and, so far as this lawsuit is concerned, the only damages sought are the costs to Delta of repair of the airplane.

Delta sued for this damage, alleging breach of both express and implied warranties. Douglas defended, *inter alia*, on the basis of language in the sale contract which

it claimed released it from any liability for the accident or its consequences. The trial court directed a verdict for Douglas on the express warranty count, ruled that the exculpatory clause relied on by Douglas was void as against public policy, and submitted the case to the jury on the issues of breach of implied warranty and of negligence. The jury returned a verdict for Delta in the amount of $233,881.35, and also answered four special interrogatories to the effect that (a) the damage to the airplane resulted from a breach of an implied warranty, (b) that proper notice of such breach had been given, (c) that Douglas was guilty of negligence which proximately caused the accident, and (d) that Delta was not guilty of contributory negligence.

In the view which we take of the meaning and effect of the exculpatory clause, we need not consider whether or not the special findings of breach of implied warranty, of negligence and of freedom from contributory negligence are supported by the evidence, nor do we consider whether or not, in light of *Rose v. Chrysler Motors Corp.* (1963) 212 Cal.App.2d 755, 28 Cal.Rptr. 185, 99 A.L.R.2d 1411, the trial court correctly withdrew the express warranty count from the jury.

The clause relied on by defendant reads as follows:

"14. WARRANTY.

"(A) Seller warrants that the aircraft, accessories, equipment and parts manufactured by Seller shall be free from:

"(1) Defects in material and workmanship furnished by Seller and used in the fabrication thereof;

"(2) Defects arising from the selection of material or process of manufacture;

"(3) Defects inherent in the design thereof in view of the state of the art on the date hereof.

"The foregoing warranty shall apply also to accessories, equipment and parts manufactured to Seller's detailed design and specifications and supplied to Seller by other manufacturers.

"(B) In cases of defects in material and workmanship, or defects arising from the selection of material or process of manufacture, such defects must become apparent in the aircraft, accessory, equipment, or part within six (6) months or one thousand (1,000) flying hours, whichever shall first expire, after delivery of the aircraft to Buyer.

"The extent of Seller's liability under this warranty as to defects in material or workmanship, and defects arising from the selection of material or the process of manufacture, is limited to the repair of such defects in the aircraft or to the repair or replacement (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

"(C) The extent of Seller's liability under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment, or part purchased hereunder, within one (1) year or one thousand (1,000) flying hours, whichever shall first expire, but not less than eight (8) months, after the delivery of said aircraft. Seller shall make all such repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft involved may not be kept out of service longer than necessary.

"(D) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

"(1) The aircraft is operated with any accessory, equipment or part not specifically approved by Seller and not manufactured by Seller or to Seller's design and specifications unless Buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

"(2) The aircraft shall not have been operated or maintained in accordance with Seller's instructions furnished under this agreement, unless Buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

"(3) The aircraft shall not have been operated under normal airline use, unless Buyer furnishes reasonable evidence that such operation was not a cause of the defect;

"(4) The aircraft shall have been repaired, altered or modified without Seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless Buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accidents shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made with suitable material and according to standard practice and engineering;

"(5) Buyer does not, within the applicable period of time specified in paragraph (B) or paragraph (C) above, return the defective aircraft, accessory,

equipment or part at its expense to Seller's factory at 3000 Ocean Park Boulevard, Santa Monica, California, or if return to Seller's factory is not feasible, to Buyer's base repair shop in the United States. Return to Buyer of the repaired, replaced, or corrected aircraft, accessory, equipment or part shall be at its expense. Disassembly of the aircraft to correct the defect, removal of the defective accessory, equipment or part and installation of the corrected accessory or new part and reassembly of the aircraft shall be at the Buyer's expense;

"(6) Buyer does not submit reasonable proof to Seller that the defect is due to a matter embraced within Seller's warranty hereunder.

"With respect to matters made the subject of Seller's approval under this paragraph (D), Seller's approval or disapproval thereof shall be made in writing to Buyer within thirty (30) days after Buyer's request for approval is received by Seller. In the event of disapproval, Seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to Buyer a written statement of approval or disapproval within such thirty (30) day period shall irrevocably and conclusively constitute approval by Seller of the subject matter of the particular request involved.

"(E) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guaranties, conditions or liabilities, express or implied, arising by law or otherwise (including without limitation any obligation of the Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer; provided, that in the event the pro-

vision relieving Seller from liability for its negligence should for any reason be held ineffective, the remainder of this paragraph (E) shall remain in full force and effect."

I.

[1-3] The first issue raised herein pertains to the breadth of the exculpatory clause (Paragraph (E) of the above quoted warranty provision). It is argued by Delta that the clause does not disclaim liability for negligence as a tort concept but only disclaims liability for contractual liability—i. e., a negligent breach of an express or implied warranty. The general rule in California[1] and in other states[2] is that exculpatory or indemnity clauses which attempt to free an actor from liability for his own negligence are basically valid but must be strictly construed and that failure to state an attempted exculpation or indemnity in plain, unambiguous and clear terminology will result in an interpretation that the clause was not intended to exempt the actor from liability for his own negligence.[3] Notwithstanding this rule of strict interpretation, the contract must be in-

[1] Consult Goldman v. Ecco-Phoenix Elec. Corp. (1961) 62 Cal.2d 40, 41 Cal.Rptr. 73, 396 P.2d 377; Vlenell Co. v. Pacific Elec. Ry. Co. (1959) 52 Cal.2d 411, 340 P.2d 601; Baldwin Contracting Co. v. Winston Steel Works, Inc. (1965) 236 Cal.App.2d —, * 46 Cal.Rptr. 421; Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal.App.2d 99, 20 Cal.Rptr. 820.

* 236 A.C.A. 617.

[2] Jacksonville Terminal Co. v. Railway Express Agency, Inc. (5 Cir. 1962) 296 F.2d 256, 261; Pan American World Airways, Inc. v. United Aircraft Corp. (1960) 3 Storey 7, 53 Del. 7, 163 A.2d 582; Alaska Airlines, Inc. v. Northwest Airlines, Inc. (D.C.Alaska 1964) 228 F.Supp. 322.

[3] Cf. Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256, 262, 37 Cal.Rptr. 896, 899, 391 P.2d 168, 171, wherein the court held that an exculpatory clause stating that "This warranty is expressly in lieu of all other warranties, express or implied, and of all other obligations on the part of the Dealer" was only an exculpation from its contractual liability.

terpreted by the court and the intent of the parties determined. (Cf. *Harvey Mach. Co. v. Hatzel & Buchler, Inc.* (1960) 54 Cal.2d 445, 447, 6 Cal.Rptr. 284, 353 P.2d 924.) The present clause includes within its provisions a statement that the buyer "waives all other * * * conditions or liabilities * * * arising by law or otherwise * * * whether or not occasioned by Seller's negligence * * *." The reference to negligence can have no meaning unless it refers to tort negligence, for an action based on warranty may be maintained whether or not there is negligence; that is its function. Even though disclaimer clauses are to be strictly construed, still we find that this clause covers not only contractual warranty liability but also tort liability.

[4,5] Secondly, Delta argues that Douglas' negligence herein was active and not passive, and that an exculpatory clause cannot disclaim liability for active negligence. We need not here attempt to define the line between active and passive negligence, nor speculate on whether the negligence which the jury found had occurred was of one type or of the other. We know of no authority for the bald statement relied on. If the language used be broad enough, an actor may disclaim liability for negligence of any type. We cannot see, in the language herein involved and above quoted, anything to limit the obvious breadth of the word "negligence"; consequently, we hold that the clause covered active as well as passive negligence.

II.

Next, Delta claims that, assuming the exculpatory clause is construed so as to apply to the facts of this case, it is void as against public policy.

[6,7] As we have said above, the law does not, in

general, prohibit a clear and express contract absolving an actor from his own negligence. Civil Code section 1791, as in force at the times herein involved,[4] provided that "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement * * *." In *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 693, 268 P.2d 1041, the court stated: "The statutory implied warranties of quality can, of course, be disclaimed by the seller, provided the buyer has knowledge or is chargeable with notice of the disclaimer before the bargain is complete." The present disclaimer clause is sufficiently broad to disclaim the implied warranty of fitness for the purchaser's purpose upon which Delta bases its breach of warranty cause of action.

[8] Furthermore, a contract which exempts one from liability for his own negligence is not necessarily invalid. In *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 96, 32 Cal.Rptr. 33, 383 P.2d 441, the court reviewed a number of exculpatory clause cases and concluded that an exculpatory provision is valid if it does not affect the "public interest." The court there stated (p. 101, 32 Cal.Rptr. 38, 383 P.2d 446): "* * * no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, * * *."

However, Delta argues that modern law, in what is commonly referred to as the field of products liability, has shown a movement away from the traditional doctrine that a manufacturer has an absolute freedom of

[4] Superseded on January 1, 1965, by Commercial Code section 2316.

contract and may disclaim his liability in all circumstances. Conceding that recent cases have imposed limits on the freedom to impose exculpatory clauses, we do not regard the instant case as within either the letter or the spirit of the authorities relied on.

Unlike *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal. 2d 57, 27 Cal.Rptr. 697, 377 P.2d 897; *Tunkl v. Regents of University of California, supra* (1963) 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441, and *Henningsen v. Bloomfield Motors, Inc.* (1960) 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1, this case involves no element of personal injury; and, also, unlike Greenman and Henningsen, involves no issue of "privity of contract."

Perhaps more important, the case at bench involves none of the elements of inequality of bargaining on which the cited cases, and other recent cases of the same sort, have laid their stress. Delta, bargaining for the purchase and delivery of an airplane yet to be built, is hardly the pain-wracked sufferer seeking emergency admission to the hospital whose plight secured relief in Tunkl; it was not faced, as were Henningsen and Vandermark, with an industry-wide stock contract not open to negotiation; it is not now faced with a "fine print" clause not known to it when it signed the contract; and it did not stand as a single inexperienced individual purchaser vis-a-vis with a large seller relatively indifferent to the making or not making of a single purchase.

It is clear from the record that Delta, one of the major airlines of the nation, with the aid of a staff of experienced executives and attorneys, had negotiated a contract with terms individual to Douglas. There is not, nor can there be, any doubt that Delta knew that the exculpatory clause was in the contract, and that it

voluntarily agreed to it. It is suggested that the contract took on an element of a "contract of adhesion" in that the clause was part of Douglas' standard form. But the clause clearly was open to negotiation,[5] and Delta was free to seek another airplane from another manufacturer on terms which (so far as this record shows) would not have included such a clause. Delta says that it preferred the Douglas plane to those of the competing manufacturers; but that fact is implicit in any purchase of a product which competes for a market —it is not the kind of compulsion to which the "adhesion" doctrine applies.

The difference between the contract before us and those involved in the cases relied on by Delta becomes apparent from the language of the leading California case on the point. In *Tunkl v. Regents of University of California, supra* (1963) 60 Cal.2d 92, 98-101, 32 Cal. Rptr. 33, 37-38, 383 P.2d 441, 445-446, the court set out the kind of transaction in which exculpatory provisions will be held invalid:

> "It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some mem-

[5] Mr. Hall, the head of the legal department at Douglas, testified that, in negotiating contracts with prospective purchasers, there were discussions as to the inclusion or exclusion of the exculpatory clause. He indicated that purchasers frequently asked that the clause be removed, and that Douglas' normal reply was that " 'We will take it out only at an increase in price.' " Mr. Hall testified that he personally made such an offer to Pan American on a DC-7C in 1954 and to Delta on a DC-8 in 1962. As to the offer made to Delta on the purchase of a DC-8 Mr. Hall testified that no dollar price was even submitted to Delta for the exclusion of the exculpatory clause because "they wanted it for nothing."

> bers of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, * * *. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

As we have pointed out above, the elements of an adhesive contract and of inequality of bargaining are here absent. Nor, although it is true that the manufacture and operation of aircraft is a matter of federal regulation, do we here have the kind of "public interest" to which the above quotation refers. This is evident from the decision in *Stephens v. Southern Pacific Co.* (1895), 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, where, in a land lease, the railroad inserted a clause relieving it of liability for any fire started by any of its employees, even if due to their negligence. When the lessee's building was destroyed by a fire started by railroad employees the lessee's insurance company paid for the loss and then sued the railroad. Concerning the fact that the railroad was a regulated carrier the court held (at p. 88, 41 P. at p. 784) that "The fact that the defendant is a common carrier has no place in the case. * * * At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far

as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A and B might deal with each other with reference to any private business undertaking."

Douglas dealt with Delta in a similar manner. The fact that Delta is a regulated enterprise and carries passengers has no relevance to the present decision. The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against Douglas for negligence. (*MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696.) Also, their right to bring an action against Douglas for breach of implied warranty would not be interfered with because the passengers were not a party to the contract containing the exculpatory clause.[6]

[9] In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on Douglas (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to

[6] See Frumer and Friedman Products Liability (1964) § 19.07[4]; Harper and James, The Law of Torts (1956) § 28.25, p. 1589: "Disclaimers of warranty or of liability for negligence bind only the parties to the transaction and do not bind third persons."

Douglas, which had neither agreed to assume it nor been compensated for such assumption.[7]

III.

Delta contends that, even if the exculpatory clause is not void because it violates public policy, the clause is void in this case because it attempts to exempt Douglas from liability for an express violation of law. Civil Code section 1668 prohibits such a clause. Delta contends that Douglas failed to comply with certain provisions of the Civil Aviation Act of 1938 (now the Federal Aviation Act of 1958) and that such acts were the proximate cause of the accident. The only understandable argument made under this contention is that, prior to delivery of the aircraft to Delta, certain adjustments were made to the nose wheel assembly by Douglas mechanics. These repairs were inspected by three inspectors who were not certified by the Civil Aviation Administration and Delta contends that such certification was required by title 14, Code of Federal Regulations, section 18.10 et seq. These regulations, promulgated under the authority of the Civil Aviation Act of 1938, provide that only certified personnel may "perform maintenance, repairs or alterations on certified aircraft coming within the applicability of this part. * * *." (Tit. 14, Code of Federal Regulations, § 18.10).

[7] See note, Disclaimers of Warranty in Consumer Sales (1963) 77 Harv.L.Rev. 318, 327: "A thwarting of the policies behind warranty need not attend recognition of disclaimers in the commercial world. There the buyer may be just as able to absorb and administer the inevitable risks of the seller's operations * * *. There is common recourse to insurance * * *. Buyers may even dictate the design, and thus be in a position to prevent the losses to which they are exposed. They are more capable of protecting themselves by caution and testing, and their own manufacturing processes and quality control systems stand between the object and ultimate users or bystanders."

Section 18.1 of that part contains the following definition of a "certified aircraft": "A certified aircraft is a civil aircraft for which an airworthiness certificate issued by the administrator has not been surrendered or revoked."

[10] Clearly there could be no violation of the above regulations unless an airworthy certificate had been issued prior to the adjustments made by Douglas on the nose wheel assembly. The only evidence as to when an airworthiness certificate was issued came from one of Delta's attorneys who asked for a stipulation that such a certificate had been issued to Douglas on November 25, 1957. Delta in its brief admits that it received the aircraft on November 25, 1957, and that the testing performed by Douglas was between November 20 and 23, 1957. Under these facts Douglas could not have violated the above regulations.

The judgment is reversed with directions to enter a judgment in favor of Douglas.

JEFFERSON, J., concurs.

FILES, P. J., being disqualified, did not participate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER DELTA AIR LINES, INC.

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TABLE OF AUTHORITIES

Cases *Page*

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) 3

Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965) 6

Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (9th Cir. 1965) 4

Tunkl v. Regents of Univ. of California, 32 Cal. Rptr. 33, 383, F.2d 441, 446 (1963) 5,6

Statutes

California Civil Code §1668 2,3,5

Other Authorities

Restatement of Contracts 3,4

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REPLY BRIEF OF PETITIONER DELTA AIR LINES, INC.

In its Brief in Opposition, McDonnell Douglas Corporation (MDC) has raised several arguments and cited several cases in a manner that calls for response.

MDC, in its seventeen page statement of the case, has gone to great lengths to confuse the issue presented in this case, *i.e.*, whether the exculpatory clause which relieves MDC, a federally regulated manufacturer of aircraft, from civil responsibility for a violation of a federal aviation regulation is void as being contrary to public policy. Through this long statement of facts MDC has attempted to show that the public interest is not really involved and that federal regulation of aviation safety is not actually undermined by such exculpatory clauses. Also, in

its argument, MDC has selectively quoted California cases in a way which obfuscates the clear law of California as to the validity of contracts which relieve a party from civil responsibility for a violation of law.

MDC maintains in its brief that it did not actually exempt itself from liability by way of the exculpatory clause, but that the warranty and exculpatory provision constitute a "risk-fixing" device pursuant to which "Delta and MDC agreed in advance upon Delta's rights and MDC's obligations, responsibilities and liabilities in the event of a 'violation of law' or other deficiency in performance on the part of MDC." (Brief in Opposition, pp. 19-20.) It is noteworthy that MDC now acknowledges that the clause *was intended to cover violations of law by MDC.* The only question remaining is whether the object of the exculpatory clause was either "directly or indirectly" to exempt MDC from responsibility for such a violation of law. See §1668 of the California Civil Code.

MDC now speaks of its obligations, responsibilities and liabilities under the "risk-fixing" device but this is entirely inconsistent with MDC's earlier statements that "none of the damages sought fall within the category of recoverable damages specified in the Warranty Article of the Purchase Agreement." (See MDC Brief in Support of Motion for Summary Judgment, p. 3.) It is thus seen that regardless of the euphemism now employed by MDC to make the exculpatory clause more palatable, the fact of the matter is that MDC denies that Delta can ~~revoer~~ recover any part of its claim under the warranty/exculpatory clause and that the object of the exculpatory clause is nothing more or less than an attempt by MDC to relieve itself of responsibility in damages for its own negligence and violation of the law. The cases cited at pages 10-11 of Delta's petition show that under such circumstances the California courts have *uniformly* stricken down the exculpatory clause.

MDC would have the Court believe that such "risk-fixing" is perfectly acceptable, even though a violation of law is involved, because the parties agreed to it (despite Delta's

contention that it had no choice.)[1] Delta submits that the so-called "risk-fixing" which exempts MDC from civil liability flowing from its violation of the law is no more permissible under the applicable law than price-fixing in an antitrust setting because the public interest and public policy cannot allow it. If this is not so, there is no validity to the rules stated in Section 575(1) of the Restatement of Contracts, Section 1668 of the California Civil Code and the principles announced by this Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). (See Delta's Petition, pp. 9-11.)

MDC also emphasizes that the rights of passengers are not compromised and that MDC remains responsible to the FAA, despite the exculpatory clause, so that the exculpatory clause does not affect the public or third parties. This is incorrect, however, because it is impossible to divorce the private interests of the parties from the public interest in a matter such as this.

What is involved is the safety of commercial aircraft, a subject in which the Federal government has an overriding public interest as is evidenced by the government's comprehensive regulation of aircraft manufacturers such as MDC. To say that this is only a private matter between MDC and Delta is to ignore the obvious fact that a defect in an aircraft can injure or kill large numbers of passengers. That they or their estates could recover against MDC and that MDC would still be responsible to the FAA for violating regulations does not remove the public interest. Surely the passengers would prefer not to be injured or killed in the first place. It is the public interest to *discourage* negligence and violations of the law

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[1] Delta's witnesses at the trial testified that because of Delta's existing fleet of DC-8's and the need for fleet uniformity, along with Delta's route structure and the efficiency of the stretched DC-8, it was not feasible to purchase any other aircraft than the stretched DC-8. Even though other aircraft obviously were available, none presented a real alternative because of Delta's particular needs. MDC states that Convair 880 aircraft were available under contracts not containing an exculpatory clause, but Delta's witnesses testified that even if these aircraft were suitable for Delta's maturing long haul routes, which they were not because of capacity limitations and high operating costs, *they were no longer in production when Delta ordered the aircraft involved here.*

before they occur and if MDC may continue to avoid civil liability for negligence and violations of law through contract then the policy of discouraging such conduct, embodied in the federal regulations, is thwarted.

It is well-accepted in virtually every jurisdiction in this country that the law will not lend its authority to the enforcement of such contracts. Section 575(1) of the Restatement of Contracts, as quoted by the court in *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965), is directly in point:

> "A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, *and a bargain for exemption from liability for the consequences of negligence is illegal if * * * (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.*" [emphasis added]

MDC is a party charged through the federal aviation regulations with a duty of public service in the manufacture of aircraft and through regulations it is required to adhere to the highest reasonable standards of safety. The exculpatory clause relieves it of liability for negligence in the performance of this duty. And, of course, MDC receives compensation for its sales of aircraft.

The California law is even more explicit, particularly with regard to contracts which relieve a party of responsibility for a violation of law. MDC has attempted to obscure this by citing and quoting cases or passages of cases which deal with circumstances *where no violation of law was involved*.

In *no* case cited by MDC has a California court found that an exculpatory clause could constitute a valid defense to an action for damages where the conduct causing the damages constituted a violation of law. There are no such cases to Delta's knowledge, but the cases cited in Delta's Petition (pp. 10-11) show that in *every* case where this situation has been presented the California courts have held the exculpatory clause invalid.

At page 19 of its Brief, MDC quotes the leading California case of *Tunkl v. Regents of the University of California*, 32 Cal. Rptr. 33, 383 F.2d 441, 446 (1963) as follows:

> ". . . obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."

This quotation is hardly a fair or complete representation of the court's treatment of the question presented in that case in which the court struck down an exculpatory clause similar to the one under consideration here.

In referring to §1668 of the Civil Code, the *Tunkl* court, after referring to a number of cases which hold unequivocally that a release from negligence contract is void, and others which had not interpreted the statute so strictly, said:

> "In one respect, as we have said, the decisions are uniform. The cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.' "

The court went on to describe generally factors for determining when the "public interest" is involved. These included the factor that the contract "concerns a business of a type generally thought to be suitable for public regulation. The party seeking exculpation is involved in performing a service of great importance to the public which is often a matter of practical necessity for some members of the public."

MDC's business is not only of the type generally thought to be suitable for public regulation, it is in fact subject to very stringent regulation by the federal government. Moreover, MDC's service of manufacturing aircraft is of great importance to the public, and transportation on such aircraft is a matter of

practical necessity for many members of the public.[1]

The court went on to say that the "public interest" cannot be narrowly defined, saying:

> "We must note, finally, that the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. We cannot lightly accept a sought immunity from careless failure to provide the hospital service upon which many must depend."

Similarly, many must depend upon the responsibility of MDC in manufacturing aircraft and the question of whether this responsibility is fulfilled is very much a matter involving the public interest.

It thus is seen that the incomplete quotation of the *Tunkl* case cited by MDC is misleading and that *Tunkl* by no means stands for the proposition that an exculpatory clause may be upheld even though a violation of law is involved. As was pointed out in Delta's Petition, *Tunkl* dealt with cases *less clear* than the violation-of-law cases. It was implicit, if not explicit, in *Tunkl* that exculpatory clauses in such cases clearly are invalid. See 32 Cal. Rptr. at 35.

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[1] In *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965), the court improperly distinguished *Tunkl* by confusing Delta's business with that of MDC and concluding that Delta was not acting as a common carrier when it purchased the aircraft from Douglas. The relevant consideration was whether *MDC*'s business was suitable to regulation and whether *MDC* was acting as a manufacturer of aircraft when it sold the aircraft to Delta, as Delta pointed out in briefs below.

In sum, MDC has not shown and cannot show that the exculpatory clause does not exempt it from liability for a violation of law or that the public interest is not involved in this case. Accordingly, Delta's Petition for Certiorari should be granted so that the Court may consider fully the very important question presented in this case.

Respectfully submitted,

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